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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~598~~ 37

INTERNATIONAL PAPER COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 23, 1930

CERTIORARI GRANTED APRIL 14, 1930

(34,729)

(34,729)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 598

INTERNATIONAL PAPER COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 598

International Paper Company, Petitioner,

vs.

The United States, Respondent

Petition for Writ of Certiorari to the United States Court of Claims

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The International Paper Company prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled action, dismissing the petition and entering judgment against the petitioner for the cost of printing the record.

Statement of the Case

The petitioner sued in the Court of Claims for compensation under the Fifth Amendment on account of the tak-[fol. 2] ing for a public use during ten months in 1918 of its flowage rights in water diverted from the Niagara River.

In the fall of 1917 and for some years prior thereto the petitioner, a manufacturer of paper and paper products, owned and operated a paper mill at Niagara Falls, New York, near the Niagara River. The mill machinery was driven by water drawn from the main power canal of the Niagara Falls Power Company which tapped the Niagara River above the Falls of Niagara. The flowage rights of the petitioner were secured to it by certain deeds and leases from the Power Company dating back to 1896, which were duly recorded and sufficient to pass an estate in realty un-

der the law of New York (Find. I and VIII; fol. 58, 59, 62, 63).*

Between February 7, 1918, and November 30, 1918, the United States "by reason of the exigencies of the national security and defense" formally requisitioned all the water which the Power Company, the petitioner's lessor, was taking from the Niagara River, expressly undertaking to pay the lessor just and fair compensation therefor (Find. XI; fol. 65, 66). This requisition was made with full knowledge of the petitioner's rights as lessee and with the express intention of depriving the petitioner of its water rights (Find. X and XII; fol. 64, 65, 68). Accompanying the requisition but in a separate document there was a so-called "waiver," under which the Power Company waived compensation in consideration for being allowed to continue to sell power to certain designated war industries, among which the petitioner was not included (Find. XI; fol. 66, 67). As a result of the requisition, the petitioner was compelled to shut down its mill for ten months (Find. XIII; fol. 68, 69), which entailed an actual out-of-pocket expense of $304,685.26, as the Court of Claims [fol. 3] specifically found (Find. XXII; fol. 70).

At the time of the taking there was in existence a treaty between the United States and Great Britain limiting the amount of water which the nationals of both countries might take from the Niagara River for power purposes (Find. VI; fol. 61). There were also in effect certain licenses issued by the Secretary of War to the Power Company under the authority of the Burton Act, as extended by a series of joint resolutions, purporting to authorize the petitioner's lessor to take from the Niagara River for power purposes the water which it was taking. These licenses were revocable at will but were in fact never revoked during the period under consideration (Find. VII; fol. 61, 62).

Some two years after the asserted taking, namely, in June, 1920, the so-called Federal Water Power Act was passed, under which a Federal Power Commission was created and a system of licensing provided for. (41 Stat. 1063).

[*References to side folios of record.]

Questions Presented

The ultimate question is whether the petitioner as a matter of law is entitled to just compensation for the taking of its water rights at Niagara Falls on the facts specially found.

Specifically, the Court of Claims erred when it decided:

(1) That the treaty with Great Britain of May, 1910, had the effect of placing "the control of the water" (meaning, apparently, the proprietary interest in the water) of the Niagara River for power purposes in the Federal Gov- [fol. 4] ernment, that this right of control existed under the Constitution and that the Federal Government was exercising it by virtue of the Federal Water Power Act of June, 1920 (fol. 72, 73, 74). It is not clear what bearing the Federal Water Power Act had upon the case, since it was not passed until some two years after the taking.

(2) That without the license from the Government, or if the existing license had been revoked as it might have been (but in fact was not), the Power Company would have had no right to use the water, and the petitioner's rights as lessee were no better than those of the lessor. As a consequence, the Secretary of War in taking the water proceeded under a claim of right (fol. 73, 74). But if this were the case, it is hard to see why the requisition order contained an express promise to pay compensation for the taking.

(3) That the act of the Power Company in executing the waiver of compensation was a voluntary act which had the effect of depriving the petitioner of any right to compensation from the United States (fol. 75). It is not evident how this could be, since the petitioner was not a party to the waiver, nor did it consent thereto. Its rights as grantee and lessee were adverse to those of the Power Company. There was no identity of interest between the two.

(4) That which the Government took was the product of the Power Company and not its plant or the use of it, [fol. 5] and consequently the petitioner's "contract" was frustrated and the damages were incidental, citing Omnia Commercial Co. v. U. S., 261 U. S. 502, and distinguishing

Duckett & Co. v. U. S., 266 U. S. 149 (fol. 75). In this the Court completely ignored the local law, for under the law and decisions of New York a lease of water rights constitutes a vested interest in the nature of realty.

(5) Finally, the Court concluded that in view of the treaty with Great Britain and the Federal Water Power Act the Federal Government had assumed "control" over the waters of the Niagara River for power purposes and consequently any vested rights which the Power Company or the petitioner as its lessee might have in the use of the water pursuant to the New York law and the decisions of the New York courts were wholly destroyed (fol. 76).

Reasons for the Petition

The writ prayed for should be allowed for the following reasons:

(1) The Court of Claims decided an important question of local law, namely, the character of the petitioner's water leases, in a way which not only was in conflict with the applicable decisions of the New York courts but completely ignored the local law as determined time after time by the New York Court of Appeals.

(2) The Court of Claims decided the Federal question involved in a way directly in conflict with the applicable decision of this Court, namely, Duckett & Co. v. U. S., 266 U. S. 149.

[fol. 6] (3) The Court of Claims decided an important question of general law in a way untenable and in conflict with the weight of existing authority in that it gave improper effect to a treaty with Great Britain and put controlling weight on an unnecessary and erroneous interpretation of the Federal Water Power Act passed some two years after the taking.

(4) The Court of Claims decided an important question of Federal law which has not been but should be settled by this Court, when, contrary to the prevailing opinion among the bench and bar, it asserted that the Federal Government possesses a proprietary interest or control over the waters of a boundary stream, quite irrespective of any question of navigation.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Claims, and submits herewith a certified transcript of the record in the Court below in support of this petition.

Respectfully submitted.

International Paper Company, by John W. Davis, Montgomery B. Angell, Attorneys for the Petitioner.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. C-668

INTERNATIONAL PAPER COMPANY

v.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On May 21, 1923, the plaintiff filed its original petition. Subsequently, to wit, on August 8, 1927, by leave of court, the plaintiff filed its Amended Petition.

Said Amended Petition is as follows:

II. AMENDED PETITION—Filed August 8, 1927

To the Honorable the Court of Claims of the United States:

The claimant, International Paper Company, respectfully represents:

1. The claimant is, and has been continuously for a period preceding the occurrence of all matters hereinafter set forth, a corporation created, organized and doing business under the laws of the State of New York, with its principal place of business at Corinth, Saratoga County, New York, and is and has been engaged in the business of manufacturing, purchasing, selling and dealing in paper and

any and all products and compounds thereof, and materials used in connection with such manufacture, including the manufacture of wood pulp and other fibres.

2. In carrying on its business, your claimant operates a number of paper mills located in several of the Eastern States of the United States, including among others, a paper mill at Niagara Falls, New York, hereinafter some- [fol. 2] times referred to as "Niagara Falls Mill." The plant of the Niagara Falls Mill is located on the American side of the Niagara River about one mile above the Falls of Niagara, within the city limits of the City of Niagara Falls, Niagara County, New York.

3. At the time the events occurred which constitute the basis for this claim, the Niagara Falls Mill was engaged in the production of paper pulp and other constituent pulps and the manufacture therefrom of news print paper for sale to various newspapers and users of news print paper throughout the United States. It operated six water wheels in the development of water power used in its manufacturing operations. These wheels were operated by water taken from the so-called "power canal" of The Niagara Falls Power Company (a power company located adjacent to and directly above the Niagara Falls Mill on the bank of the Niagara River), at an intake point some 300 feet from the point where the power canal taps the Niagara River. The right to take and use this water in the development of water power arose under a series of deeds and leases executed by The Niagara Falls Power Company as more specifically set forth hereinafter. The water so taken from the power canal was carried in a branch canal to the wheel pits of the Niagara Falls Mill, and was thence discharged into a branch tunnel which joined below the main tailrace tunnel of The Niagara Falls Power Company's power canal, and eventually flowed again into the Niagara River below the Falls. The respective locations of the Niagara Falls Mill and the plants of The Niagara Falls Power Company, together with the method of intake and discharge of the water used by the Niagara Falls Mill in its manufacturing operations, are shown in a sketch attached hereto as "Ex- [fol. 3] hibit A" to this complaint and incorporated herein as part of this paragraph. There was no other available

source from which the International Paper Company could obtain water or water power for use in the operation of its Niagara Falls Mill except that described above.

4. The Niagara Falls Power Company is a corporation organized under the laws of the State of New York, with its principal place of business at Niagara Falls, New York. The plants of The Niagara Falls Power Company are located on the American side of the Niagara River, just above the Niagara Falls Mill of the International Paper Company, and separated from it by The Niagara Falls Power Company's power canal, which connects with the Niagara River, and by means of which The Niagara Falls Power Company takes water from the Niagara River for use in carrying on its business.

5. The Niagara Falls Power Company, as it exists at the present time, was formed by the consolidation, effective October 31st, 1918, of The Niagara Falls Power Company (constituent), Hydraulic Power Company of Niagara Falls, and the Cliff Electrical Distributing Company. This consolidation was duly effected pursuant to Chapter 596 of the Laws of the State of New York of 1918, and was accomplished at the suggestion of the United States Government in order to conserve the water power resources at Niagara Falls. The present Niagara Falls Power Company succeeded to all the rights of the constituent Companies. The original Niagara Falls Power Company was the pioneer in the United States in hydro-electric development and electrical transmission. It was organized under Special Act of the Legislature of the State of New York in 1886 under the name of the Niagara River Hydraulic Tunnel Power [fol. 4] and Sewer Company of Niagara Falls. Its charter was amended from time to time by various special acts of the New York legislature and its amended charter authorized it, among other things, to take water from the Niagara River and to manufacture and distribute hydro-electric current and to lease water for water power purposes. It acquired lands bordering upon the shores of the Niagara River, both above and below Niagara Falls, including the land noted upon the sketch attached hereto as "Exhibit A," constructed its plant, and took and used water for power development from the Niagara River under authority of

(1) conveyances from the original riparian owners under patents from the State of New York, (2) grants from the State of New York of land under the waters of the Niagara River adjoining the uplands of the Company at the intake of its canal, (3) various Special Acts of the Legislature of the State of New York, and finally, (4) licenses duly issued by the Federal Government, which licenses were renewed from time to time by the appropriate Department of the United States.

6. Sometime about 1903 or 1904, an International Water Ways Commission, composed of three representatives of the United States, and three representatives of the Dominion of Canada, was created. On or about March 19th, 1906, the American Commissioners made a report in which they recommended that the amount of water diverted on the American side should be limited to 18,500 cubic feet per second (C. F. P. S.), and that permits should be granted as follows:

To The Niagara Falls Power Company	8,600 C. F. P. S.
To the Niagara Falls Hydraulic Power & Manufacturing Company, the prede- [fol. 5] cessor of the Hydraulic Power Company of Niagara Falls	9,500 C. F. P. S.
To the Erie Canal and its tenants	400 C. F. P. S.
Total	18,500 C. F. P. S.

The volume of water in cubic feet per second is roughly reducible to water horse power by multiplying the cubic feet per second by the fall in feet and then by multiplying the product by one of the following fractions, 0.1134, 0.091, 0.085 or 0.079, according as the efficiency is 100%, 80%, 75%, or 70%, respectively. Thus, the 8,600 C. F. P. S. allocated to The Niagara Falls Power Company, as noted above, with its approximate fall of 135 feet and an approximate efficiency of 75% was equivalent to about 98,685 water horse power. Conversely, the water horse power is roughly reducible to C. F. P. S. in approximate figures by multiplying the horse power by the figure 8.81, 11.00, 11.73 or 12.59, according as the efficiency is 100%, 80%, 75% or 70%, respectively, and by dividing the product by the fall of water in feet.

7. Upon the transmission of the aforesaid report to Congress, a law was enacted known as the Burton Law, approved June 29th, 1905 (34 Stat. L. 626) which authorized the Secretary of War to grant permits for the diversion of 15,600 C. F. P. S. from the Niagara River. Pursuant to this statute, the Secretary of War duly issued the following permits:

To The Niagara Falls Power Company	8,600 C. F. P. S.
To the Niagara Falls Hydraulic Power & Manufacturing Company	6,500 C. F. P. S.
[fol. 6] To the Erie Canal and its tenants	500 C. F. P. S.
Total	15,600 C. F. P. S.

These permits were extended from time to time by the Secretary of War under the provisions of several successive joint resolutions of Congress, and for a number of years these limitations upon the amount of water used were continued.

8. In the meantime, however, pursuant to the report of the International Waterways Commission, steps were taken looking toward a treaty between the United States Government and the British Government with regard to the diversion of water from the Niagara River. Such a treaty was finally entered into, and was promulgated in May, 1910. This treaty provided that the United States might authorize the diversion for power purposes of an amount of water not exceeding in the aggregate a daily diversion at the rate of 20,000 C. F. P. S., and the British Government might authorize the diversion of water for power purposes not exceeding in the aggregate a daily diversion at the rate of 36,000 C. F. P. S. Notwithstanding the provisions of this treaty, however, the amount of water which the American companies were authorized to divert was limited, as noted above, to 15,600 C. F. P. S. until the beginning of the World War. In the spring of 1918, however, the demand for power becoming acute, the Federal Government authorized by license The Niagara Falls Power Company and the Hydraulic Power Company of Niagara Falls, and, subsequently, the consolidated company, the new Niagara Falls Power Company, to divert 19,500 C. F. P. S. from the

Niagara River, the remaining 500 C. F. P. S. being allotted to the Erie canal and its tenants at Lockpork, New York. This allocation of the water has continued from that time [fol. 7] until the present.

9. There has never been a time within the period covered by the matters presented in this complaint during which The Niagara Falls Power Company, or its constituent, The Niagara Falls Power Company, has not been fully authorized both by the State of New York and by the Federal Government (as and when the Federal Government has undertaken to regulate the amount of water which might be diverted from the Niagara River) to divert and take water from the Niagara River in an amount which it has diverted and taken.

10. The rights of the International Paper Company to take and use water from the power canal of The Niagara Falls Power Company for the operation of its Niagara Falls Mill were created under a series of deeds, leases and agreements as follows: By deed dated March 7th, 1896, duly recorded in the County Clerk's Office of Niagara County, N. Y., The Niagara Falls Power Company, the constituent of the present Niagara Falls Power Company and at that time the owner of the entire tract of land in the City of Niagara Falls now the site of the present Niagara Falls Power Company's plant and the Niagara Falls Mill of the International Paper Company, conveyed to the Niagara Falls Paper Company, a corporation organized under the laws of Illinois and authorized to do business in the State of New York, certain described land and land under water in the City of Niagara Falls which at present constitutes the site of the Niagara Falls Mill of the International Paper Company, together with the right "to take, use and develop water and water power to the extent of 3,000 horse power" forever. The grant was in fee simple, subject to [fol. 8] the reservations contained in the deed, including the payment of $24,000 as an annual rental for the right to take and use the 3,000 horse power as described in the said deed. The Power Company covenanted that it was lawfully seized of the land in question and had good right to convey and "that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and that

the party of the second part (the Paper Company) on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have and hold the said premises forever." The Power Company further agreed to furnish and maintain for use of the Paper Company during twenty-four hours every day a full and sufficient right and opportunity to take water from the Niagara River at a point opposite the premises granted, or, at the option of the Paper Company, from the main canal of the Power Company at a designated point, and to discharge into the main tailrace of the Power Company through the branch tailrace of the Power Company an amount of water held to be equivalent to 3,000 horse power, as described in the deed. A copy of the said deed of March 7th, 1896, is attached hereto as "Exhibit B" and made a part of this paragraph as if fully incorporated herein.

11. On the same day upon which the aforementioned deed was executed, namely, March 7th, 1896, The Niagara Falls Power Company entered into a lease with the Niagara Falls Paper Company, a copy of which lease is attached hereto as "Exhibit C" and made a part of this paragraph as if fully incorporated herein, in which The Niagara Falls Power Company, after reciting the execution of the aforementioned deed and that the Niagara Falls Paper Company desired to obtain water power in addition to that to be [fol. 9] developed under the terms of the aforesaid deed, agreed to permit the Paper Company, its successors and assigns, from a date not later than October 1st, 1896, and for a period of ten years thereafter, with the right to the Paper Company, at its option, to obtain one or more additional terms of ten years each, extending, however, not later than January 1st, 1936, to take and discharge through The Niagara Falls Power Company's main tunnel, water from the main canal of The Niagara Falls Power Company, or from the Niagara River, sufficient to develop 2900 horse power in addition to the 3000 horse power described in the deed of even date, as more specifically set forth in the lease in question and, in addition, it was agreed that the Niagara Falls Paper Company should have the right, on ten days' written notice to The Niagara Falls Power Company, to

take, use and discharge additional water sufficient to develop blocks of not less than 500 horse power up to the full amount of the capacity of the discharge tunnel leading from the bottom of the Paper Company's wheel pit to the main tunnel of The Niagara Falls Power Company; it was further stipulated that the Niagara Falls Paper Company should pay $29,000 a year as an annual rental for the aforesaid 2900 horse power, and should pay for the additional right to take and use water power in blocks of 500 horse power at the rate of $10 per horse power per annum.

12. By deed dated January 31st, 1898, duly recorded in the County Clerk's Office of Niagara County, N. Y., the International Paper Company acquired all the right, title and interest of the Niagara Falls Paper Company in its land and water rights, including the rights of the Niagara Falls Paper Company acquired from The Niagara Falls Power Company under the aforesaid deed and lease, both dated [fol. 10] March 7th, 1896. A copy of this deed of assignment is attached hereto marked "Exhibit D" and made a part of this paragraph as if fully incorporated herein.

13. By agreement dated June 1st, 1898, between The Niagara Falls Power Company and the International Paper Company, duly recorded in the County Clerk's Office of Niagara County, N. Y., The Niagara Falls Power Company, after reciting the deed and lease with the Niagara Falls Paper Company of March 7th, 1896, and the rights acquired by the Niagara Falls Paper Company thereunder, and after reciting the assignment by the Niagara Falls Paper Company to the International Paper Company of the lands and water rights acquired thereunder, consented to the transfer and assignment to the International Paper Company of the said deed and agreement, and confirmed the grants, rights and agreements so transferred and assigned to the International Paper Company, and agreed with the International Paper Company faithfully to fulfill and carry out the said agreement with the same force and effect as if the said deed and agreement originally had been made with the International Paper Company instead of with the Niagara Falls Paper Company the International Paper Company on its part assumed all the obligations contained in the said deed and in the said agreement, dated

March 7th, 1896, and covenanted faithfully to fulfill and carry out the same. A copy of this agreement is attached hereto marked "Exhibit E" and made a part of this paragraph as if fully incorporated herein.

14. Pursuant to these several deeds and leases the International Paper Company, since January 1st, 1898, has had the right to take water and in fact since that time until on [fol. 11] or about February 7, 1918, did take water from the main power canal of The Niagara Falls Power Company at the point of intake shown on the sketch attached as "Exhibit A" equivalent approximately to 725 C. F. P. S., which amount was sufficient to produce 8,156.25 horse power as computed under the aforesaid deeds and leases, for which power it has paid to The Niagara Falls Power Company an annual rental of $75,562.50 per year. The water so taken was used to develop power necessary to operate your claimant's Niagara Falls Mill, which had a normal daily capacity of 154 tons of news print paper and was operating upon that basis when the following events occurred.

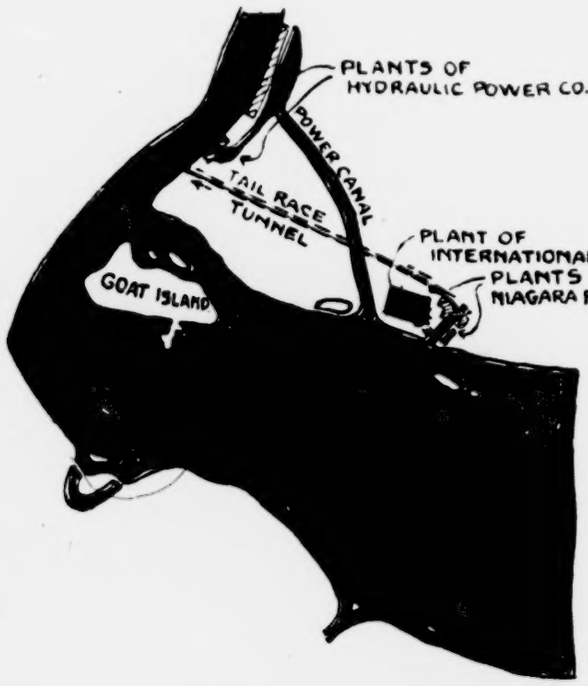
15. On or about December 20, 1917, the International Paper Company was notified by the United States Government that the Government proposed to requisition, for war purposes, the water which the Niagara Falls Mill was taking from the power canal of The Niagara Falls Power Company, and consequently it would be necessary that the supply of water so taken be shut off and the use thereof discontinued. The International Paper Company was informed, however, that sufficient time would be allowed it in which to complete the manufacture of such material as it then had in its Niagara Falls Mill before the shutdown should be effective. Pursuant to these orders, early in January, 1918, two wheels of the Niagara Falls Mill were shut down, and shortly thereafter two more wheels were stopped, and on or about twelve-thirty A. M., February 7th, 1918, the entire amount of water was shut off and the mill closed. Thereupon the United States, acting under and pursuant to its governmental powers, did take and use for purposes of its own, during the period from February 7th, 1918, until November 30th, 1918, without making any com-

[fol. 12] pensation therefor, the water and water rights to which the International Paper Company was entitled under and by virtue of the deeds and conveyances hereinabove set forth.

16. Your claimant did not voluntarily relinquish its rights to the water and water rights so taken; on the contrary, at the time of such taking it made demand for just compensation therefor. Nevertheless, the United States has failed and refused to make any compensation for the aforesaid taking notwithstanding that your claimant is entitled to just compensation under the provisions of the 5th Amendment to the Constitution of the United States.

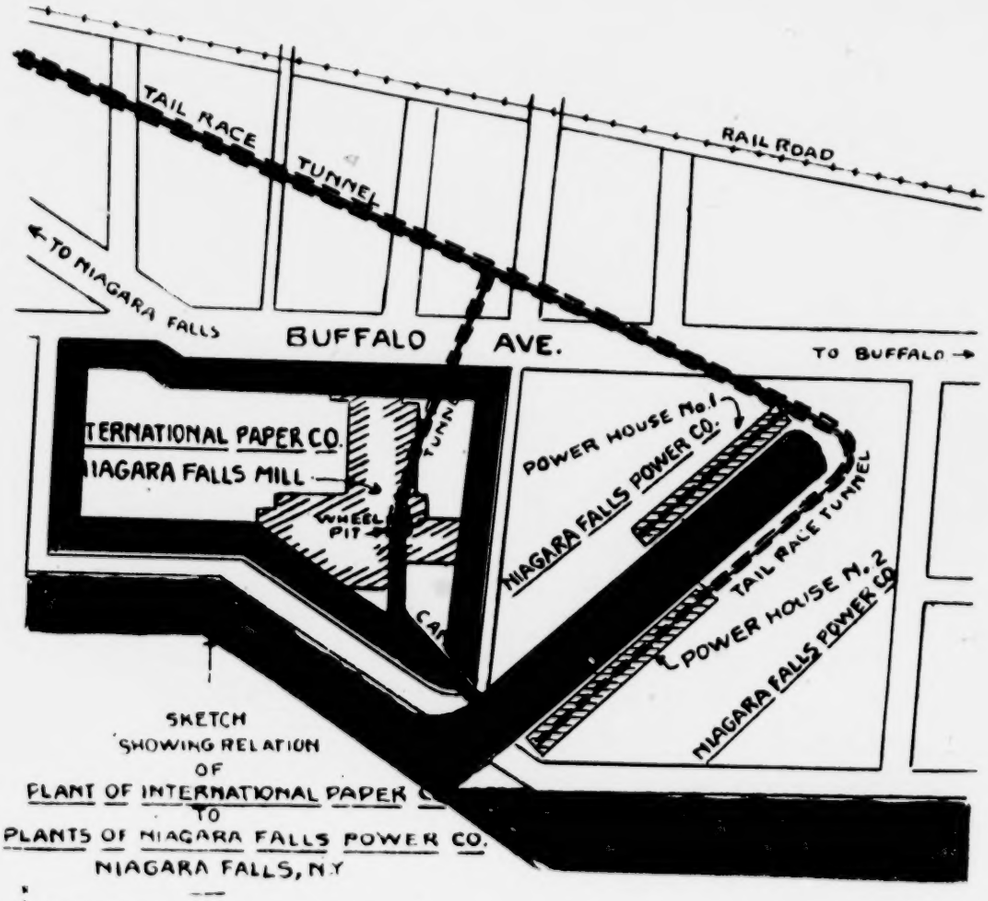
17. Your claimant alleges that the rights which it acquired to take water from the power canal of The Niagara Falls Power Company were property rights within the meaning of the 5th Amendment to the Constitution of the United States; that the United States deprived your claimant of such property rights and by so doing became obligated to make just compensation therefor; that the United States has, nevertheless, failed and refused to make any compensation; and that by virtue of the aforesaid taking of its property without compensation, your claimant has been damaged to the extent of $590,732.20, with interest at 6% per annum until paid, which amount your claimant hereby claims.

18. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim or any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant is a citizen of the United States and [fols. 13 & 14] has at all times borne true allegiance to the Government thereof and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true, and the claimant claims



SKETCH
SHOWING LOCATION
OF
POWER DEVELOPMENTS
ON
AMERICAN SIDE
NIAGARA FALLS, N.Y

APPROXIMATE SCALE 1"= 4500.'



SKETCH
SHOWING RELATION
OF
PLANT OF INTERNATIONAL PAPER C
TO
PLANTS OF NIAGARA FALLS POWER CO.
NIAGARA FALLS, N.Y

APPROXIMATE SCALE 1" = 500.'

$590,732.20 with interest at 6% per annum until paid and prays judgment therefor.

Stetson, Jennings & Russell, Attorneys for Claimand, Office and Post Office address: 15 Broad Street, Borough of Manhattan, New York City. John W. Davis, of Counsel.

Duly sworn to by Allen Curtis. Jurat omitted in printing.

(Here follows Exhibit A to Amended Petition, side folio 14-a)

[fol. 15] EXHIBIT B TO AMENDED PETITION

This indenture, made the Seventh day of March, 1896, between The Niagara Falls Power Company, a corporation organized and existing under the laws of the State of New York (hereinafter called "Niagara Company"), party of the first part, and Niagara Falls Paper Company, a corporation organized and existing under the laws of the State of Illinois, and authorized to do business in the State of New York (hereinafter called the "Paper Company"), party of the second part.

Witnesseth, That the said party of the first part in consideration of the agreements and covenants hereinafter contained to be kept and performed by the party of the second part and of the sum of One Dollar, lawful money of the United States, paid by the party of the second part, the receipt whereof is hereby acknowledged, and of other good and sufficient consideration it thereunto moving does hereby grant and release unto the said party of the second part, its successors and assigns for ever

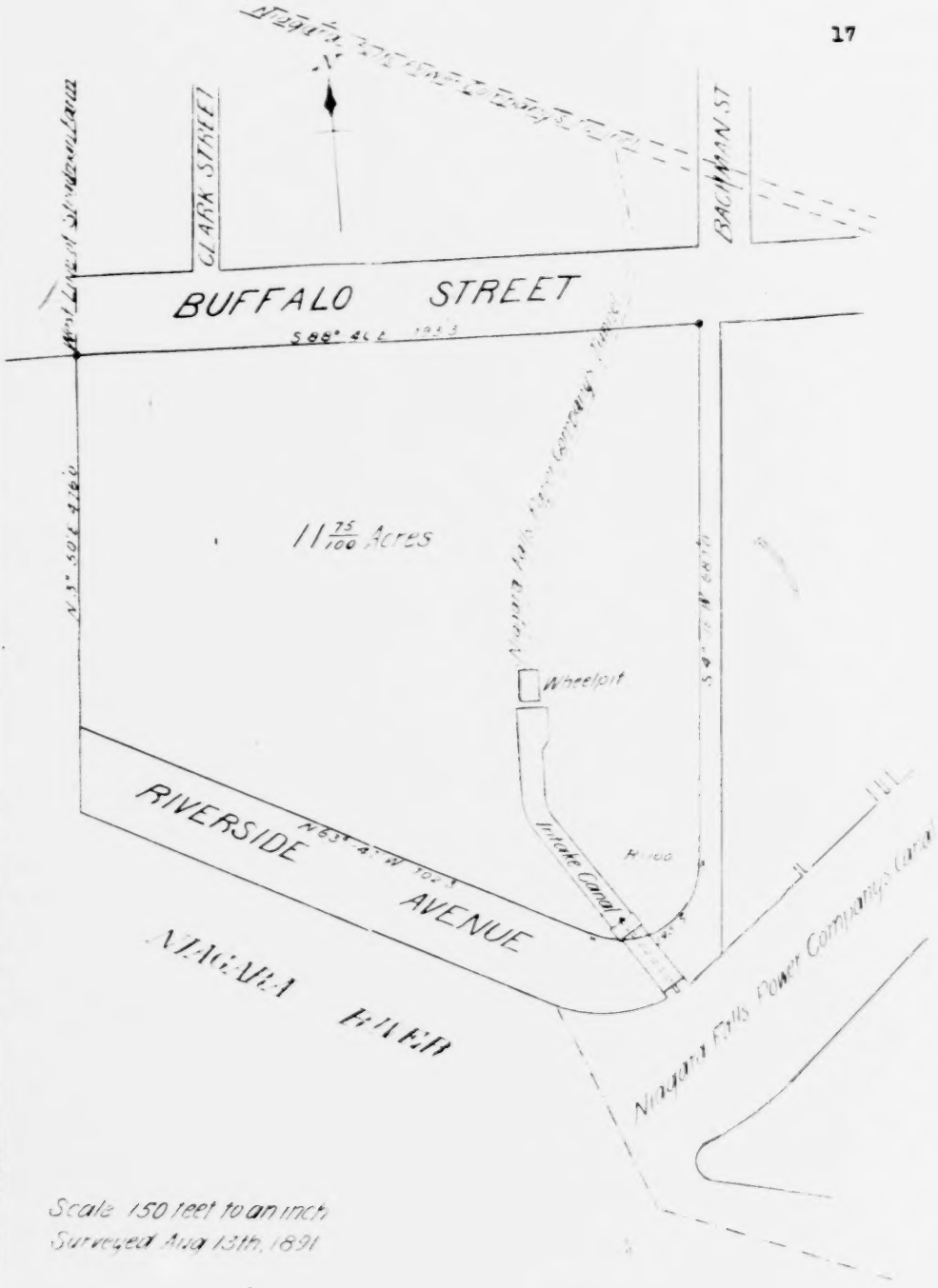
All that certain lot, piece or parcel of land and land unlaim or any part thereof or interest therein has been made. and State of New York, being a part of lot number eleven, Steadman Farm (so called), more particularly described as follows:

Beginning at a point in the southerly line of Buffalo Street where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so called), running thence South eighty-eight (88) degrees and forty (40) minutes East magnetic, along said southerly line of Buffalo Street, seven hundred and ninety-three and three-tenths (793.3) feet to a stone monument set in said southerly line; thence South four (4) degrees and sixteen (16) minutes [fol. 16] West magnetic six hundred and eighty-seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River; thence by curve to the Southwest with radius of one hundred (100) feet one hundred and ninety-five and five-tenths feet (195.5 ft.); thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes East magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hundredths (11.75) acres of land and land under water, more or less; together with three thousand horse power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging; the following being a plan of such demised premises showing the point of water intake, wheel pit, discharge tunnel and other appurtenances:

(Here follows plan, side folio 17)

[fol. 18] Being the same premises heretofore demised by the party of the first part to the party of the second part, by a certain indenture of lease, dated September 1st, 1891, and recorded in Niagara County Clerk's Office October 13th, 1891, in Liber 209 of Deeds, at page 364;

Excepting and reserving therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo Street, and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls Power


CLARK STREET
BACHMAN ST
BUFFALO STREET
11 75/100 Acres
Wheelport
RIVERSIDE AVENUE
Intake Canal
Niagara Falls Power Company's Canal
Scale 150 feet to an inch
Surveyed Aug 13th, 1891

1140

38988	+ 9	300				1250		10500		4500	350	7000		3850	3505		
22	+ 9	1				1	1	4		1	1	3		3	4		
174066	- 7	1050			1802	58500	3500	22646	5800	47143	4135	29490					
83	- 5	2			5	12	1	12	2	26	5	18					
244725	- 5	2550		3004	2002	62850	3500	34396	24350	52643	4485	36890		8850	5505		
120	- 3	4		2	6	15	2	17	5	28	6	23		4	5		
1389534	- 5	36973	19950	23909	39189	177279	98593	172650	188875	329838	82423	118369	15975	63579	21630	4826	1550
1091	- 7	74	15	49	80	98	50	183	66	196	53	109	23	30	28	6	3

Company by deed dated June 11, 1892, and recorded in the Niagara County Clerk's Office June 29th, 1892, in Liber 265, at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's Office, June 11th, 1892;

And also excepting and reserving therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Paper Company to connect with the main tunnel of the Niagara Company, in which branch tunnel, however, the Paper Company, its successors and assigns shall have the sole right of exclusive use for its and their own purposes, so long as it and they shall continue to pay the rental hereinafter specified for the right to take, use and develop water and water power to the extent of Three thousand (3,000) Horse Power, and all other conduits, sluiceways, wheel pits and tunnels of the Niagara Company.

To have and to hold the above granted premises to the said party of the second part, its successors and assigns, forever, but nevertheless (and this grant not being intended to prevail against any provision hereinafter contained, [fol. 19] though apparently in some degree repugnant thereto) subject to the reservations and to the agreements, terms and conditions and all other matters and things hereinafter set forth as obligatory upon the party of the second part, and among other things, to the payment of the said Niagara Company, its successors and assigns, as an annual rental for the right to take, develop and use upon the premises hereby granted, water and water power sufficient to produce Three thousand (3,000) Horse Power as hereinafter defined, of Twenty-four thousand Dollars in gold coin of the United States of the standard of weight and fineness of the year 1890, or the equivalent of this commodity in United States currency, at the option of the party of the first part, payable in equal quarterly installments; payment of Six Thousand Dollars in gold coin, such as specified, or its equivalent as specified, to be made on the thirtieth day of June, 1896, and a like payment to be made every three months thereafter, viz: on the last day of every March, June, September and December in each year thereafter.

The Niagara Company, for itself, its successors and assigns, covenants with the said party of the second part, its

successors and assigns, that the said Niagara Company is lawfully seized in fee of the above granted land; that it has good right to convey the same as aforesaid; that the same excepting as hereinafter mentioned, is free of all incumbrances; that the party of the first part will execute or procure any further necessary assurance of the title to said premises; and that it will warrant and defend the same and the estate therein as hereby conveyed against the lawful claims and demands of all persons; and that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and that the party of the second [fol. 20] part, on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever.

The Niagara Company reserves, however, unto itself, its successors and assigns, the right, at all reasonable times, to enter into and upon the demised premises, for the purpose of inspecting or repairing any canals, tunnels, water courses, waterways, or other appurtenances belonging to it or connected with its works, and of removing obstructions therein, as well as to measure and compare the quantity of water used and wasted, or suffered to flow out and waste, with the quantity hereby granted.

The Niagara Company further reserves to itself, its successors and assigns (this reservation being a limitation and condition of this conveyance) a right, privilege and easement (subject to the lien of the mortgage or deed of trust hereinafter mentioned), to construct, establish and maintain upon, through or under said lands without unnecessarily impairing the use and enjoyment thereof by the grantee thereof, any tunnels, conduits, sluiceways, pipes for air, water, gas, or sewers, wires or machinery for the creation and transmission, distribution and application of power, heat or light created by or through the use or operation of any tunnel of the Niagara Company or of any extension thereof, together with any reasonable and proper highways and tracks, switches and sidings for a terminal railroad; provided that no such reserved right shall be exercised without subsequent fair and reasonable compensation to the grantee for any damage done by reason of the exercise of such right, privilege or easement. Such com-

pensation shall be ascertained and fixed by arbitration in [fol. 21] the manner hereinafter provided.

The Paper Company, for itself, its successors and assigns, hereby covenants with the Niagara Company that it and they will keep, fulfill and observe, all and singular the covenants, stipulations and conditions herein contained or referred to on its or their part to be kept, performed and fulfilled; and that it will pay, or cause to be paid, the rent for water power hereinbefore reserved to be paid at the times and in the manner hereinbefore mentioned; and it is further expressly covenanted and agreed as an express condition upon which this conveyance is made and accepted, that neither the Paper Company, its successors or assigns, nor any one acting or claiming under it or them, shall at any time or in any manner construct, or maintain or operate, on or under the granted premises, any tunnel, canal or other appliance, for the production of light, heat or power, by the use of the water of the Niagara River, except from time to time by express agreement with and consent in writing of the party of the first part, based on a resolution of its Board of Directors in terms authorizing such consent, and that in the event of any violation of this covenant and condition, the premises herein granted shall revert to the party of the first part, its successors or assigns.

This Conveyance is made and accepted upon the following further conditions and covenants, to wit:

Article I. The said premises shall be used by the Paper Company, it- successors or assigns, for the purposes of its various manufacturers (without nuisance) as hereinafter provided.

[fol. 22] Article II. Niagara Company shall furnish and maintain for use of Paper Company during twenty-four hours of every day of the year (excepting Sundays and holidays and not more than ten other days in every year; on all of which days, however, Paper Company may use the power without further charge, if Niagara Company shall not shut the same off for purposes of maintenance or repair; rent to be waived for any other days of suspension) a full and sufficient right and opportunity (always excepting any interference from ice) to take water from the Niagara River at a point opposite the granted premises

or at the option of Paper Company, from the main canal of Niagara Company at the point shown on the plan, and to discharge into the main tailrace or tunnel of Niagara Company through the branch tail race constructed by Paper Company, and in conformity to the plans of Niagara Company's Engineers and to their decision 300 cubic feet of water per second when the fall available on said property shall be 120 feet and a quantity inversely proportionate to this fall of 120 feet if the said available fall be more or less than 120 feet (such 300 cubic feet per second being herein held to be the equivalent of Three thousand (3,000) horse power on the shaft); such water so discharged to be continuously carried away as aforesaid through the main tunnel of Niagara Company at its expense.

Article III. For the purpose of ascertaining the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal or canals of the Niagara Company, through the granted premises or into the tunnel of the Niagara Company by the Paper Company, its successors and assigns, the Niagara Company reserves the right, from time to time as it may desire by its duly authorized agent, hydraulic engineer or other employee, and with the necessary workmen or assistants, to enter upon the granted [fol. 23] premises, to measure and compare the quantity of water drawn or suffered to flow upon or through the said premises, with the quantity granted, and may also adopt and use such other mode of making or of verifying the said measurements as the circumstances of the case may require; and the Paper Company shall at all times furnish all reasonable facilities to said employees and assistants in thus ascertaining the quantities of water drawn, or discharged, as aforesaid.

Article IV. The Niagara Company shall construct and keep in good repair its main tunnel, and from time to time, as occasion may require, shall remove and clear out obstructions that may accumulate therein, always excepting ice.

The head canals, penstocks, branch tailrace, tunnels, flumes, wheel rooms, wheel pits and other water connections shall be made, maintained and be kept in good repair by the Paper Company, and the water intake joined to the

Niagara River or to the Niagara Company's water course shall be maintained by the Paper Company in a durable, substantial and water tight manner. The Paper Company shall also maintain a good and substantial stop gate at the head of each water intake, that shall be so constructed that when requisite it may be closed, whether the water be then passing through the intake or not, and that when closed it will shut out the water from the said intake. The Paper Company's penstocks, flumes, wheel rooms, and other water connections shall be so constructed and maintained that the water may be shut out from them without injury to them.

All the work contemplated in this article shall be done and maintained according to plans bearing the approval of and in manner satisfactory to the Engineers of the Niagara Company.

[fol. 24] Article V. If the Paper Company shall sustain any injury to its water privilege, happening from the willful neglect or misconduct of the Niagara Company the rent reserved for water and water power, for so much of the right or privilege injured may cease during the time such injury shall continue, but no longer.

Article VI. The Paper Company shall not use more water than granted, or otherwise contracted for with Niagara Company, nor waste it, nor permit it to be wasted for want of repair, or through the deficiency of its works or otherwise; and if so wasted or if more be used than is granted, the Niagara Company may stop the water from entering the flumes by closing, locking and sealing the gates across them, or by any other method, until such waste or excessive use be sufficiently guarded against.

Article VII. All buildings erected upon the granted premises more than ten feet in height shall be of stone or brick, the roofs covered with slate or some incombustible material, and the covings well secured against fire; and if any other be erected the Niagara Company or its assigns may enter and abate them, and have any other appropriate remedy.

Article VIII. The granted premises shall be held, used and improved for mills, manufactories or buildings appurtenant thereto, or for such dwelling houses, boarding

houses, sheds and other outhouses as shall be required for the accommodation of the owners, agents, clerks, overseers, machinists, watchmen or operatives employed in such mills, and shall not be appropriated to any other purpose whatever, nor transferred, sold or alienated, except subject to all the conditions and restrictions of this conveyance.

Article IX. The Paper Company shall not use any build- [fol. 25] ing for any purpose, nor set up or continue any laboratory, powder mill, furnace or forge, or any chemical or other works whatever, which may be so noxious or dangerous, from fire or otherwise, as to impair, injure or endanger the life, safety, health or reasonable comfort of any person living and employed in and about the land or works of the Niagara Company, or which shall endanger any buildings, property or works placed by the Niagara Company, or others, upon lands owned, granted or demised by the Niagara Company. In case any such prohibited works shall be set up, continued or used, the Niagara Company may take judicial proceedings to abate them, and also may sue for damages, and may stop the water as above mentioned from passing into the flumes or canals of the Paper Company, until such prohibited works be removed or discontinued.

Neither shall the Niagara Company set up, continue or use any such prohibited works on its lands so near that of the Paper Company as to cause the above described mischiefs, or either of them; and should any such prohibited works be set up, continued or used by the Niagara Company, the Paper Company may take judicial proceedings to abate the same.

Provided, however, that the foregoing agreement to prevent nuisances is not to be understood to prevent any party from building, using and maintaining machine shops, with the smiths' forges hammers and other things necessary and pertaining thereto, for making all kinds of machinery, nor to prohibit any party from setting up, using, enlarging or improving any establishment for bleaching, dyeing, coloring or printing goods, with all things necessary therefor (excepting dangerous or noxious works as aforesaid), and no party shall have the right to object to the use of any building for the purposes for which it has been used before

or at the time of the acquisition of his or its rights, or to [fol. 26] object to any building previously erected, on account of the materials of which it is composed or the manner in which it may be built.

The granted premises and all works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the works of the Niagara Company, and especially any and all obstruction or pol-ution of the water of the Niagara River, from which, near Grass Island the Niagara Company intends to draw water for domestic and other purposes.

Article X. The granted premises and the works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the Hydraulic Canal of the Niagara Falls Hydraulic Power and Manufacturing Company, as provided in an agreement between that Company and the Niagara Company, dated the 30th day of December, 1889, and recorded in the office of the Clerk of Niagara County on the 18th day of January, 1890, in Liber 198 of Deeds, at page 9, as amended by a modifying agreement between the same parties dated January 27th, 1896, and recorded in the said office of the Clerk of Niagara County.

Article XI. The respective successors or assigns of the parties are declared to be entitled to all the rights, advantages and forfeitures, and bound by all the obligations, duties and conditions of, and remedies against, their original parties respectively, as herein set forth, unless otherwise expressed.

Article XII. The Niagara Company reserves the right to draw off the water from the canals, or tunnels, or of closing the same temporarily, for the purpose of clearing out or removing obstructions therein, or of repairing the same, and also, whatever necessary, for the purposes of prosecut- [fol. 27] ing and continuing the operations of the Niagara Company, its successors and assigns, in the building of mills and constructing the waterworks connected therewith, in the way usually done in similar cases, and with as little interruption in the use of water power as the circumstances and nature of the case may permit.

Article XIII. The Power to be developed as aforesaid shall not be used elsewhere than on the granted premises, nor shall it be let or assigned on said premises to any other person at any price less than that which at the time may be charged by the Niagara Company for similar blocks of power for similar purposes; but no such transfer shall release any party claiming hereunder from any obligations of this grant, unless nor until such transfer shall have been approved and such transfer accepted by written instrument executed by the Niagara Company (with the approval of the Trustee under said mortgage), specifying the fact and extent of such release.

Article XIV. The Paper Company shall have in all roads surrounding the said premises the same rights as any and all other takers of power from the Niagara Company, which, however, does not hereby covenant or agree to construct or provide any roads other than those now in existence. The Paper Company shall also have the right to cross the outer road or riverway, with a canal, over which it shall construct and maintain a sufficient bridge, and also have the right of dockage in front of the granted premises and along the said outer road.

Article XV. This conveyance and agreement is in all respects subject to the reservations, limitations and conditions contained in a certain mortgage or deed of trust made by the Niagara Falls Power Company to the Central Trust [fol. 28] Company of New York, as Trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29, 1891, and was recorded in the Niagara County Clerk's Office, April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office, July 14th, 1891, in Liber 211 of Mortgages, at page 549.

Article XVI. The Paper Company shall pay all the rents herein reserved for the right to take, develop and use water and water power to the Niagara Company as herein provided, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured by the mortgage above mentioned and notice of such default shall have been received by the

Paper Company: and in case of and after any such default and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereunder directly to the Trustee under said mortgage for the benefit of the bondholders.

Provided, however, and this grant is upon the express condition that (1) if it shall happen that the said rent, or any part thereof, shall not be paid on any day on which the same ought to be paid as aforesaid: or (2) if it shall happen that the Paper Company, its successors or assigns, shall fail to keep or shall violate any other condition or covenant herein contained, then, and in every such event, such default or violation may be notified to the Paper Company or to its successors or assigns by the Niagara Company, or by the Trustee of the mortgage aforesaid, and if such default or violation shall continue for sixty days after [fol. 29] such notice thereof shall have been given either by mailing the same at the post office in Niagara Falls, or by posting the same in a conspicuous place upon the granted premises, then, and in every such event it shall and may be lawful to and for the Niagara Company, its successors and assigns, into the said granted premises or any part thereof in the name of the whole to re-enter and repossess, have and enjoy the same again as of their first and former estate and interest therein, anything herein contained to the contrary notwithstanding, and no waiver of any such right of re-entry at any time shall affect or waive any right to re-entry accruing subsequently to such waiver.

Whenever an arbitration shall become necessary under the provisions of this conveyance, the same shall be established and conducted as follows: The Niagara Company, its successor or assigns shall nominate one fit and impartial person, and the Paper Company, its successors or assigns shall nominate one other fit and impartial person, which nominations shall be made and signified in writing by each party to the other; and in default of such nomination by either party for the space of thirty days after request for such nomination shall have been duly communicated in writing to such party by the other party, the person who shall have been so nominated by the other party shall appoint and associate with himself one other fit and im-

partial person; and if the persons so nominated or appointed shall differ in judgment as to the subject of decision by them, they shall appoint a fit and impartial person to be associated with them for such purpose, if they can agree on such person, or, if they cannot agree, then each of them shall nominate two fit and impartial persons, and from the names of the four persons so nominated that of one of them shall be drawn by lot, who shall be associated for [fol. 30] the purpose aforesaid with the said two persons previously so respectively nominated or appointed; and the decision under oath of any two of the three persons who shall be so nominated or appointed shall in all cases be binding and conclusive. If, after any nomination of an arbitrator as hereinbefore provided duly made, a person so nominated shall for any reason be unable or shall decline to serve as such arbitrator, or shall be objected to by any party, the party hereto so nominating the person so becoming unable or declining to serve, or being objected to by the other party, shall at his option have the right to substitute some fit and impartial person qualified as aforesaid as arbitrator in the place and stead of the person unable or declining to serve or being objected to, provided that no person chosen by the other two arbitrators or by lot as above contemplated shall be subject to such objection.

And inasmuch as this is and is intended to be the corporate obligation of the two parties hereto respectively, their successors and assigns, any and all individual liability of the stockholders and trustees and directors of either and each of the corporations parties hereto is hereby expressly waived, and no party or person claiming hereunder shall at any time or place allege or assert any such individual liability in respect of any obligation or default under this agreement, or any judgment thereon, and no recourse thereon shall be had against any such stockholder, trustee or director.

In witness whereof, the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its President and its

[fol. 31] corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

Executed in two uniform originals.

The Niagara Falls Power Company, by Charles A. Sweet, Vice President. Attest: James S. Milner, Secretary. (Corporate Seal of the Nigara Falls Power Company.) Niagara Falls Paper Company, by John L. Norton. Attest: Jonh C. Morgan, Secretary. (Corporate Seal of Niagara Falls Paper Company.)

STATE of NEW YORK,
County of Erie, ss:

Be it remembered that on this seventh day of March, 1896, before me, the undersigned, a Notary Public in and for the County of Erie came Charles A. Sweet and James S. Milner, both of them known to me personally, and the said Sweet known to me to be Second Vice Preesident, and the said Milner known to me to be the Secretary of the Niagara Falls Power Company, the corporation described in and which executed the foregoing lease as party of the first part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

[fol. 32] And the said James S. Milner, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Power Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by the authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Secretary of said Company; that he knows the said Charles A. Sweet, and knows him to be Second Vice President of said Company; that the signature of said Charles A. Sweet subscribed to the foregoing instrument is in the genuine handwriting of said Charles A. Sweet, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof I have hereunto set my hand and official seal the day and year first above written.

H. Schanzlin, Notary Public, Erie Co., N. Y.

STATE OF NEW YORK,
Erie County Clerk's Office, ss:

I, Frank B. Steele, Clerk of said County and of the Courts thereof, the same being Courts of Record, do hereby certify that H. Schanzlin whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was, at the time of taking such proof or acknowledgment, a Notary Public, in and for the said County, duly commissioned, sworn and authorized to take the same; and further, that I am well acquainted with his handwriting, and [fol. 33] verily believe that the signature to the said proof or acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Buffalo, this 9 day of April, A. D. 1896.

Frank B. Steele, Dp. Clerk. (Seal of County Clerk, Erie Co.)

Ack. of Notary

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this first day of April, 1896, before me, the undersigned, a notary public in and for the County of New York, came John L. Norton and John C. Morgan, both of them known to me personally, and the said Norton known to me to be the President and the said Morgan known to me to be the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing lease as party of the second part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

And the said John C. Morgan, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Paper Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by authority of the Board of Directors of said Company, and that he signed his name

[fol. 34] thereto by like authority as Secretary of said Company; that he knows the said John L. Norton, and knows him to be President of said Company; that the signature of said John L. Norton subscribed to the foregoing instrument is in the genuine handwriting of said John L. Norton, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof I have hereunto set my hand and official seal the day and year first above written.

Wm. H. Bruder, Notary Public (201), N. Y. County.
(Notarial Seal.)

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2 day of April, 1896.

Henry D. Purroy, Clerk. (Seal of County Clerk.)

[fol. 35] EXHIBIT C TO AMENDED PETITION

This Agreement, made this seventh day of March, 1896, between The Niagara Fall Power Company (hereinafter called "Niagara Company"), a corporation organized and existing under the Laws of the State of New York, party of the first part, and the Niagara Falls Paper Company (hereinafter called "Paper Company"), a corporation or-

ganized and existing under the Laws of the State of Illinois, party of the second part,

Witnesseth: That whereas the Niagara Company, by a deed of even date herewith, has conveyed to the Paper Company certain premises in the City of Niagara Falls under certain terms and conditions, as by reference to said deed will more fully appear, being the same premises described in an indenture of lease thereof made by said Niagara Company to said Paper Company, dated September 1st, 1891, and recorded October 13th, 1891, in Liber 209, of Deeds at page 364; and

Whereas by the terms of said conveyance the Niagara Company agrees to supply to the Paper Company the right to take, develop and use upon the premises therein granted water and water-power sufficient to produce Three thousand (3,000) Horse Power of the character and under the conditions set forth in said conveyance, for which said right to take, develop and use water and water-power the Paper Company therein agrees to pay an annual rental fixed in said deed; and

Whereas the Paper Company desires to obtain from the Niagara Company the right to take, develop and use upon said premises water and water power additional to that to be developed under the terms of said conveyance, and to [fol. 36] pay for such right by way of rental for a term of years, and not as a condition of said conveyance, the Niagara Company being willing to comply with such desire and request of the Paper Company.

Now, therefore, In consideration of the premises and of the rents and agreements hereinafter reserved and contained on the part and in behalf of the Paper Company, its successors and assigns, to be paid, kept and performed, said Niagara Company has agreed, and by these presents hereby does agree upon the conditions hereinafter stated from a date not later than October 1st, 1896, and for a period of ten (10) years thereafter, with the right to the Paper Company at its option to one or more additional term or terms of ten (10) years each, extending not later than January 1st, 1936, (every such optional right of Paper Company to a further term to be dependent upon its exercise and notification of exercise of such right at some time during the ninth (9th) year of the next preceding term),

to permit the Paper Company, its successors and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of Niagara Company or from the Niagara River, (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water) sufficient to develop and to use upon said granted premises, when and as required for use upon the premises conveyed to the Paper Company, Twenty-nine hundred (2900) Horse Power, in addition to the Three thousand (3,000) Horse Power described by the above mentioned conveyance: the term Horse Power herein used being understood to involve and consist of the right to draw, throughout the twenty-four hours of each day, and during the term of the agreement, (but excluding Sundays and legal holidays, on all of which days, however, the Paper Company may use the [fol. 37] power without further charge, if the Niagara Company shall not shut the same off for purposes of maintenance or repairs, rent to be waived for any other days of suspension), from the canal of the Niagara Company, at a point designated in the plan of the said granted premises, through the said granted premises, and to discharge into the main tail-race tunnel of the Niagara Company by way of the shaft and the branch tail-race (already constructed upon the granted premises), one tenth (1/10) of one cubic foot of water per second, when the total fall available to the Paper Company for power purposes adjacent to the granted premises is one hundred and twenty (120) feet, or a quantity per second inversely proportionate to the said available fall, when it is more or less than one hundred and twenty (120) feet, and in order to prevent disputes as to the power in the variations of the said available fall from changes of the level of the water surface in the Niagara River or in the main tail-race tunnel, or in both, it is understood and declared that the quantity of water per second shall be varied in inverse proportion to the variation of the said available fall; thus, on a fall of one hundred (100) feet, the flow of water constituting one horse power would be twelve one-hundredths (12/100) of a cubic foot per second.

It is understood and expected that the Paper Company will be able to take, use and discharge water as aforesaid

on or before October 1st, 1896; from which date the Paper Company shall pay the rent reserved hereunder whether or not the right hereby demised shall or shall not be exercised by the Paper Company.

It is agreed that at any time during any term of this agreement, whether the first or any extended term thereunder, and after ten (10) days written notice to the Niagara Company the Paper Company from time to time shall have [fol. 38] additional right to take, use and discharge more water sufficient to develop blocks of not less than Five hundred (500) Horse Power, and up to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Paper Company's wheel-pit to the main tunnel of the Niagara Company, which water and water power shall be measured in the manner above stated and during any and every term of this agreement, the Paper Company shall make payment of rental as hereinafter specified for the largest amount of water (not less than 5900 Horse Power) which it shall theretofore have called for and shall be entitled to take, use and discharge under and of its agreements with Niagara Company.

It is further agreed that all such water and water power shall be used and developed upon the premises conveyed in said deed of even date herewith, and shall not be used otherwise or elsewhere than is herein provided, the right to use and develop such water and water power may be sub-let or assigned for use upon said premises for any purposes not injurious to the Niagara Company, or to the lessees of adjoining property, the Directors of the Niagara Company to be sole judge upon the question of injury under the meaning of this contract; it being understood that the Paper Company intends to use such power for the purpose of manufacture of pulp, paper and other paper products.

The Paper Company for itself, its successors and assigns hereby covenants that for the additional right to take, use, discharge and develop water and water power to be provided hereunder, it will, on the tenth day of the month succeeding the end of each quarter, make quarterly payments in gold of the present standard of weight and fineness, as follows:

[fol. 39] (1) The sum of Twenty-nine thousand ($29,000.00) Dollars per annum for the Twenty-nine hundred

(2900) Horse Power, to which it is first entitled hereunder, such payment to begin the first day of October, 1896, and being additional to its obligation to pay the sum of Twenty-four thousand ($24,000.00) Dollars per annum for the right to take, use, discharge and develop Three thousand (3,000) other Horse Power under said deed.

(2) For any additional right to take, use, discharge and develop water and water-power next called for, for use hereunder, in blocks of not less than Five hundred (500) Horse Power, up to the full capacity of the discharge tunnel on the Paper Company's lands, payment by the Paper Company shall be at the rate of Ten ($10) Dollars per Horse Power per annum, for and during every year after such right to take, use, discharge and develop water and water-power shall have been called for, whether such right shall or shall not actually be exercised by the Paper Company; it being understood and intended that the aggregate annual amount payable by the Paper Company, its successors and assigns, during the term of this agreement or any extended term for the right to take, use, discharge and develop water and water power shall never be less than the rental for the total amount of water and water-power up to that time called for at the rate here specified, whether such amount of power shall or shall not be actually used by the Paper Company, its successors or assigns.

It is agreed that the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal of the Niagara River, through the premises or into the tunnel of the Paper Company by the Niagara Company, its successors and assigns, shall be ascertaind, measured and paid for as is provided in like regard in the conveyance of even date herewith from the Niagara Company to the [fol. 40] Paper Company, and hereinbefore referred to; and that all the conditions in respect of the delivery and use of the water to produce Three thousand (3,000) Horse Power provided to be paid for under the terms of said Conveyance shall apply to and govern the use of the additional Horse Power provided to be taken under this agreement, excepting that no failure by the Paper Company, its successors and assigns, to pay the rents herein reserved for the right

to take, use, discharge and develop water and water power under this agreement shall constitute such a violation of the covenant of said conveyance in that regard as shall entitled the Niagara Company, its successors or assigns to enter and re-possess itself or themselves of the premises granted by said conveyance, so long as the conditions thereof shall be faithfully observed by the Paper Company, its successors and assigns.

This agreement is in all respects subject to the reservations, limitations and conditions, terms and provisions contained in a certain mortgage or deed of trust made by The Niagara Falls Power Company to the Central Trust Company of New York, as Trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29th, 1891, and was recorded in the Niagara County Clerk's Office April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office July 14th, 1891, in Liber 211 of Mortgages, at page 529.

The Paper Company shall pay all the rents herein reserved to Niagara Company as herein provided during the original term or any extension thereof, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured [fol. 41] by the mortgage above mentioned and notice of such default shall have been received by the Paper Company; and in case of, and after any such default, and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereinunder directly to the Trustee under the said mortgage for the benefit of the bondholders.

In witness whereof the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its President and

its corporate seal to be hereunto affixed and attested by its Secretary, on the day and year first above written.

Executed in two uniform originals.

The Niagara Falls Power Company, by Charles A. Sweet, Vice-President. Attest: James S. Milner, Secretary. (Seal.) Niagara Falls Paper Company, by John L. Norton, President. Attest: John C. Morgan, Secretary.

STATE OF NEW YORK,
County of Erie, ss:

Be it remembered that on this seventh day of March, 1896, before me, the undersigned, a notary public in and for the County of Erie, came Charles A. Sweet and James [fol. 42] S. Milner, both of them known to me personally, and the said Sweet known to me to be the Second Vice President, and the said Milner known to me to be the Secretary of the Niagara Falls Power Company, the corporation described in and which executed the foregoing lease as party of the first part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

And the said James S. Milner, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y., that he is the Secretary of the Niagara Fall Power Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by the authority of the Board of Directors of said Company and that he signed his name thereto by like authority as Secretary of said Company; that he knows the said Charles A. Sweet, and knows him to be Second Vice President of said Company; that the signature of said Charles A. Sweet subscribed to the foregoing instrument is in the genuine handwriting of said Charles A. Sweet, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof, I have hereunto set my hand and official seal the day and year first above written.

H. Schanzlin, Notary Public, Erie Co., N. Y. (Seal.)

State of New York,
Erie County Clerk's Office, ss:

I, Frank B. Steele, Clerk of said County and of the Courts thereof, the same being Courts of Record do hereby certify [fol. 43] that H. Schanzlin whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was, at the time of taking such proof or acknowledgment, a Notary Public, in and for the said County, duly commissioned, sworn and authorized to take the same; and further that I am well acquainted with his handwriting, and verily believe that the signature to the said proof or acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Buffalo, this 9 day of April A. D. 1896.

Frank B. Steele, Dp. Clerk. (Seal.)

Ack. of Notary.

State of New York,
County of New York, ss:

Be it remembered that on this first day of April, 1896, before me, the undersigned, a notary public in and for the County of New York, came John L. Norton and John C. Morgan, both of them known to me personally, and the said Norton known to me to be the President and the said Morgan known to me to be the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing lease as party of the second part hereto, and on behalf of said corporation, they acknowledged to me the execution of said lease.

And said John C. Morgan, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Paper Company, that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was [fol. 44] affixed thereto by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Secretary of said Company;

that he knows the said John L. Norton, and knows him to be President of said Company; that the signature of said John L. Norton subscribed to the foregoing instrument is in the genuine handwriting of said John L. Norton, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said Deponent.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

Wm. H. Bruder, Notary Public (201), N. Y. County.
(Seal.)

Form 1

State of New York,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknewledgment, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

[fol. 45] In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2 day of Apl. 1896

Henry D. Purroy, Clerk. (Seal.)

Exhibit D to Amended Petition

This indenture, made this 31st day of January in the year 1898, between the Niagara Falls Paper Company, a corporation organized and existing under the laws of the State of Illinois, and authorized to do business in the State of New York, hereinafter called the "Grantor," party of the first part, and International Paper Company, a corporation duly organized and existing under the laws of the

State of New York, hereinafter call the "Grantee," party of the second part.

Witnesseth:

Whereas, the Grantor has acquired certain lands, water and water power at Niagara Falls in the State of New York, by a certain indenture from the Niagara Falls Power Company dated March 7, 1896, and recorded April 9, 1896, in the office of the County Clerk of Niagara County in said State, in Liber 242, page 232; and

Whereas, the Grantor has agreed to sell, convey and assign the said lands, and the said water and water power, and to assign the lease thereof to the Grantee.

Now, therefore, the said Niagara Falls Paper Company, in consideration of the sum of one dollar and other good [fol. 46] and valuable consideration to it in hand paid by the Grantor, the receipt whereof is hereby acknowledged, has bargained and sold, and does hereby grant and convey unto the Grantee, its successors and assigns forever, all that certain lot, piece or parcel of land and land under water in the City of Niagara Falls, County of Niagara and State of New York, being a part of lot number seven, Steadman Farm (so-called), more particularly described as follows:

Beginning at a point in the southerly line of Buffalo Street, where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so-called), running thence south eighty-eight (88) degrees and forty (40) minutes east magnetic, along said southerly line of Buffalo Street seven hundred and ninety-three and three tenths (793.3) feet to a stone monument set in said southerly line; thence south four (4) degrees and sixteen (16) minutes west magnetic six hundred and eighty-seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River; thence by curve to the Southwest with radius of one hundred (100) feet one hundred and ninety-five and five-tenths (195.5) feet; thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes east magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hundredths (11.75)

acres of land and land under water, more or less; together with three thousand horse power, such as are described in said Indenture, to be used as prescribed in the conditions and covenants therein set forth, with all the privileges and appurtenances to the same belonging; a plan of said prem- [fol. 47] ises showing the point of water intake, wheel-pit, discharge tunnel and other appurtenances, being annexed to said Indenture.

Together with the tenements, hereditaments and appurtenances, and all the estate, right, title and interest of the Grantor in and to said premises and every part thereof, and also all leaseholds, leases, rights under leases, or under contracts, covenants and agreements, terms or parts of terms owned by the Grantor, or to which it now is or shall at any time hereafter become entitled; all machinery, tools, implements, materials, furniture and rights and privileges of every kind and description however derived and whereever situated; all lands whether under water or not; all water powers and leases thereof and all interests therein; all improvements upon rivers, canals, ponds, and lakes owned by the Grantor, and all rights to float logs thereon, and any and all other rights, privileges and interests therein; all rights of flowage, shorage, boomage, and all rivers, lakes, canals, shores, sluice and other rights; all mill rights and privileges, water-ways and others ways, and all real estate and interest therein wherever such real estate may be situated, and all mixed and personal property of whatever nature or description appurtenant to or connected with or in use upon the property hereby conveyed now owned by the Grantor or in which it has any interest, all papers, maps, inventories and documents in any wise referring or relating to the property hereby conveyed, so far as the same are muniments of title, excepting, however, from the property hereby granted and assigned all cash on hand, book accounts, amounts due to Grantor, manufactured paper on hand, and stocks, bonds and other securities held by it or in which it has any interest.

[fol. 48] Excepting and reserving therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo

Street, and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls Power Company by deed dated June 11, 1892, and recorded in the Niagara County Clerk's office June 29th, 1892, in Liber 265, at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's office, June 11th, 1892.

And also excepting and reserving therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Grantor to connect with the main tunnel of the Niagara Falls Power Company, in which branch tunnel, however, the Grantee, its successors and assigns, shall have the sole right of exclusive use for its and their own purposes, so long as it and they continue to pay the rental hereinafter specified for the right to take, use and develop water and water power to the extent of three thousand (3,000) horse power, and all other conduits, sluice-ways, wheel-pits and tunnels of the Niagara Falls Power Company.

Being the same premises conveyed and demised to the Grantor by the Niagara Falls Power Company by the Indenture hereinafter mentioned, subject, however, to all the covenants, conditions and reservations therein contained, and reference is hereby made to said Indenture for a particular statement thereof.

To have and to hold the above granted premises to the said party of the second part, its successors and assigns, forever, but nevertheless subject to the reservations and [fol. 49] to the agreements, terms and conditions and all other matters and things in said Indenture set forth as obligatory upon the party of the second part thereto, and among other things, to the payment to the Niagara Falls Power Company, its successors and assigns, of the annual rental provided for by said Indenture which may accrue or become due from and after the date of the transfer of the property hereby conveyed.

The Grantor, for itself, its successors and assigns, covenants with the Grantee, its successors and assigns, that the Grantor is lawfully seized in fee of the above granted land; that it has good right to convey the same as aforesaid; that the same excepting as in said Indenture mentioned are free of all incumbrances; that the Grantor will execute or procure any further necessary assurance of the

title to said premises, and that it will warrant and defend the same and the estate therein as hereby conveyed against the lawful claims and demands of all persons, and that said power by the said Indenture agreed to be taken and paid for shall be maintained as therein provided, and that the grantee, on paying the yearly rental for such power, and performing the covenants and conditions therein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever.

And for the consideration aforesaid, and also in consideration of the assumption by the grantee of the obligation to pay the rent by said Indenture reserved which may accrue from and after the date of the transfer to the grantee of the property hereby conveyed, and of the obligation to fulfill the covenants of said lease from and after said date, the grantor does hereby further grant, convey, assign, transfer and set over unto the grantee the said indenture hereinbefore mentioned, together with all and singular the [fol. 50] premises, property, easements, rights and privileges therein mentioned and described, and all the buildings and improvements thereon with the appurtenances, and all rights, title and interest of the grantor therein or thereto, and in and to any and all property, easements, rights and privileges granted and conveyed by said Indenture.

To have and to hold all the said lands, water and water power and said Indenture, unto the said grantee, its successors and assigns forever, subject, however, as to the said water and water power conveyed thereby, to the conditions and terms and to the covenants, agreements and limitations in said indenture contained, and the grantor does hereby covenant, promise and agree to and with the said grantee, that the said assigned premises, and the rights therein hereby conveyed and assigned, now are free and clear of and from, all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever, except as hereinbefore mentioned.

In witness whereof, the Niagara Falls Paper Company in pursuance of resolutions duly adopted by its Board of Directors and also by its stockholders, has caused this indenture to be executed by its President in its name, and

its corporate seal to be hereto affixed and attested by its Secretary, this 31st day of January, 1898.

Niagara Falls Paper Co., by J. L. Norton, Pres.

Attest: J. C. Morgan, Sec'y. (Seal.)

[fol. 51] State of New York,
City and County of New York, ss:

On the first day of February in the year 1898, before me personally appeared John C. Morgan, to me known, and being by me duly sworn did depose and say that he resided at Niagara Falls in the State of New York; that he was the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors and of the stockholders of said corporation, and that he signed his name thereto by the like order.

Wm. H. Bruder, Notary Public, New York County. (Seal.)

State of New York,
County of New York, ss:

I, William Sohmer, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

[fol. 52] In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 5 day of Feby. 1898.

Wm. Sohmer, Clerk. (Seal.)

Exhibit E to Amended Petition

This agreement made this first day of June, 1898, between Niagara Falls Power Company, hereinafter called "Niagara Company," a corporation organized and existing under the laws of the State of New York, party of the first part, and International Paper Company, hereinafter called "Paper Company," a corporation organized and existing under the laws of the State of New York, party of the second part.

Witnesseth, That

Whereas, the Niagara Company, by deed dated March 7, 1896, conveyed to the Niagara Falls Paper Company certain premises in the City of Niagara Falls, together with the perpetual right to take, develop and use upon the premises therein granted, water and water power sufficient to produce three thousand horsepower, of the character and under the terms and conditions in said deed particularly mentioned, to which reference is hereby made:

Whereas, by an agreement dated the same day the Niagara Company also agreed to permit the said Niagara Falls Paper Company, its successors and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of the Niagara Company, [fol. 53] or from the Niagara River, sufficient to develop and to use upon premises conveyed to the Paper Company twenty-nine hundred horse-power in addition to the three thousand horse-power hereinbefore mentioned, of the character and upon the terms and conditions in said agreement particularly mentioned, to which reference is hereby made, and also the further right, upon ten days' written notice to the Niagara Company, to take, use and discharge more water, sufficient to develop blocks of five hundred horsepower up to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Niagara Falls Paper Company's wheel-pit to the main tunnel of the Niagara Company, upon the terms in said agreement particularly mentioned; and

Whereas, the said agreement for such additional twenty-nine hundred horse-power, and such further amounts in blocks of five hundred horse-power as the Niagara Falls Paper Company should elect to take, provided for the use of

such additional power for a period of ten years from October 1, 1896, with the right to the Niagara Falls Paper Company and its assigns, at their option, to one or more additional term or terms of ten years each, extending not later than January 1, 1936, upon the same terms, such option to be exercised and notification of such exercise given the Niagara Company at some time during the ninth year of the next preceding term; and

Whereas, the said extensions were limited by said agreement to January 1, 1936, for the reason that the present term of existence of the Niagara Company expires March 31st, 1936, and the Niagara Company is willing to continue the said extensions beyond the date so long as it shall continue in existence; and

[fol. 54] Whereas, the Niagara Falls Paper Company subsequently gave notice to the Niagara Company of its election to take thirteen hundred additional horse-power under the said option in addition to the twenty-nine hundred provided for by said agreement; and

Whereas, the Paper Company has purchased the real estate, property and rights of the Niagara Falls Paper Company, including the real estate conveyed to it by the said deed from the Niagara Company, and all its rights thereunder and under the said agreement hereinbefore mentioned, and took and received a conveyance and assignment thereof from the Niagara Falls Paper Company dated January 31st, 1898; and

Whereas, the said purchase, conveyance and assignment were made and received by the Paper Company upon the agreement on the part of the Niagara Company to consent to the said conveyance and assignment by the Niagara Falls Paper Company, and to confirm to the Paper Company the grants and rights included in the said deed and agreement hereinbefore mentioned and so assigned to the Paper Company;

Now, therefore, in consideration of the premises and of the assumption by the Paper Company of the obligations in said deed and agreement, and of the agreement on the part of the Paper Company to pay the rent and fulfill the terms and conditions therein reserved and contained, and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto

do hereby covenant and agree to and with each other as follows, that is to say:

First. The Niagara Company hereby consents to the transfer and assignment to the Paper Company of the said deed [fol. 55] and agreement, both dated March 7, 1896, between the Niagara Company and the Niagara Falls Paper Company, and of all right, title and interest of the Niagara Falls Paper Company therein, thereto and thereunder, and does hereby confirm the grants, rights and agreements so transferred and assigned to the Paper Company, and agrees with the Paper Company to faithfully fulfill and carry out the said agreement with the same force and effect as if said deed and agreement originally had been made with the Paper Company instead of with the Niagara Falls Paper Company.

Second. The Niagara Company hereby further covenants and agrees that the Paper Company shall have the right at its option after January 1, 1936, to one or more additional term or terms of ten years each, so long as the corporate existence of the Niagara Company shall be renewed and continued, to take and discharge through the Niagara Company's main tunnel from the main canal of the Niagara Company or from the Niagara River (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water), sufficient to develop and to use upon the said premises the said forty-two hundred horse-power, in addition to the three thousand horse-power described in the above mentioned conveyance, and upon ten days' written notice to the Niagara Company such further amounts of water as shall be sufficient to develop blocks of not less than five hundred horse-power up to the full amount of the capacity of the present discharge tunnel, leading from the bottom of the Paper Company's wheel-pit to the main tunnel of the Niagara Company, such additional water to be taken under said options, at the rents and upon the terms and conditions particularly mentioned in the said agreement of March 7, [fol. 56] 1896; provided, however, that such optional right of the Paper Company to further terms beyond January 1, 1936, shall be exercised, and notification of exercise of such right given to the Niagara Company at some time during the ninth year of the next preceding term.

Third. The Paper Company hereby assumes the obligations contained in the said deed and in said agreement dated March 7, 1896, and covenants and agrees with the Niagara Company to faithfully fulfill and carry out the same.

In witness whereof, the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its First Vice President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

The Niagara Falls Power Company, by Charles A. Sweet, Vice-President. Attest: L. A. Groat, Secretary. (Seal of the Niagara Falls Power Company.) International Paper Co. Hugh J. Chrisholm, 1st Vice-President. Attest: Warner Miller, Secretary. (Seal of International Paper Company.)

[fol. 57] III. General Traverse.—Filed Sept. 17, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. Argument and Submission

On January 14 and 15, 1929, this case was argued and submitted on merits by Mr. Montgomery B. Angell, for plaintiff, and by Mr. Dan M. Jackson, for defendant.

[fol. 58] V. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed November 4, 1929.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

SPECIAL FINDINGS OF FACT

I

The plaintiff, International Paper Company (hereinafter referred to as paper company), is a corporation created and organized on January 31, 1898, under the laws of the State of New York, with its principal office and place of business at Corinth, Saratoga County, New York, and having a general office located in the city of New York, New York. Since its organization it has been engaged in the business of manufacturing, purchasing, selling, and dealing generally in paper and any and all products and compounds thereof, and materials used in connection with such manufacture, including the manufacture of wood pulp and other fibers. At all times material to this cause of action, the paper company owned and operated some fifteen paper mills located at different points in New York and New England, including a paper mill at Niagara Falls, New York, hereinafter sometimes referred to as "Niagara Falls Mill." The plant of the Niagara Falls Mill was located on the American side of the Niagara River between a mile and a mile and three-quarters above the Falls of Niagara, within the city limits of the city of Niagara Falls, Niagara County, New York.

II

During December, 1917, and for many years prior thereto, the Niagara Falls Mill of the paper company was engaged in producing wood pulp and other constituent pulps and the manufacture therefrom of newsprint paper for sale to various newspapers and users of newsprint paper throughout the United States. The power used in its manufacturing operations was derived from six water wheels or water turbines, located in a wheel pit on its property some 175 [fol. 59] feet below the surface. The paper company ob-

tained the water necessary for the operation of these six wheels from the main power canal of the Niagara Falls Power Company (hereinafter sometimes referred to as the power company), which was located adjacent to and directly above the Niagara Falls Mill on the banks of the Niagara River. The main intake canal of the power company took its supply of water from the Niagara River. A small side canal leading into the Niagara Falls Mill tapped the main power canal of the power company some 300 feet from the point of intake of the main power canal from the Niagara River. The water taken by the paper company through this side canal was carried through a surface canal to its flumes, thence down the penstock and so to the water wheels in the wheel pit. After the water had served its purpose in turning the water wheels, it was discharged into a tailrace tunnel, which joined the main tailrace tunnel of the power company and was ultimately discharged into the Niagara River gorge below the Falls of Niagara. The sketch, attached to the amended petition herein as Exhibit A, shows the geographical relationship of the International Paper Company's Niagara Falls Mill and the Niagara Falls Power Company's plant.

III

The Niagara Falls Power Company is a corporation organized under the laws of the State of New York with its principal place of business at Niagara Falls, New York. It was formed by a consolidation, effective October 31, 1918, of the Niagara Falls Power Company (constituent), Hydraulic Power Company of Niagara Falls, and the Cliff Electrical Distributing Company, pursuant to chapter 596 of the laws of New York of 1918, and in accordance with a certain joint agreement of consolidation dated September 20, 1918. The Niagara Falls Power Company (constituent) was organized in 1886 under a special act of the Legislature of the State of New York, chapter 83 of the Laws of 1886, under the name of the Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls. It was organized for the purpose, among other things, of furnishing hydraulic power for manufacturing purposes in the town of Niagara Falls and in the county of Niagara. Among its

specified powers, as granted by the Legislature of the State of New York, were the following:

"(a) To convey lands:

"(b) To sell, lease, and supply the waters taken from the Niagara River between certain specified points or the power to be developed therefrom for manufacturing, electrical, or power purposes." (Chap. 109, §2, Laws of N. Y., 1889.)

Its name was changed to the Niagara Falls Power Company by order of the Supreme Court of the State of New York, dated November 11, 1889.

IV

The power company (constituent) acquired lands bordering upon the shores of the Niagara River just above the Falls of Niagara, constructed a plant thereon, and took and used water from the Niagara River to furnish hydraulic power for manufacturing purposes and to manufacture [fol. 60] electrical power. The claim of right of the original power company and its successor, the present power company, to take, use, sell, lease, and supply water from the Niagara River was and is derived from the following sources:

"(a) Private grants in fee of lands bordering on the Niagara River extending upwards of some two miles in length above and below the point of intake of the power company's canal, and including the point of intake.

"(b) Letters Patent from the State of New York dated December 31, 1891, and March 3, 1892, and recorded respectively in Book of Patents No. 44, page 487, and Book of Patents No. 48, pages 401-403, granting to the power company as the owner of the uplands, certain lands under water and between high and low water mark in the bed of the Niagara River in front of and adjacent to the uplands owned by the power company;

"(c) Special acts of the Legislature of the State of New York specifically granting to the power company the right to take, use, store, sell, and lease water from the Niagara

River, viz: Chapter 83 of the Laws of 1886; chapter 109 of the Laws of 1889; chapter 253 of the Laws of 1891; chapter 513 of the Laws of 1892; chapter 477 of the Laws of 1893."

During the year 1917 and for many years prior thereto the power company owned and operated two hydroelectric plants, one on either side of its intake canal. In these plants it generated electrical energy by power obtained from the waters diverted by it from the Niagara River through its main power canal. The water so used by it and the water taken by the paper company through the side intake canal was part of the water which the power company diverted from the Niagara River.

V

On March 19, 1906, the American members of the International Waterways Commission, a commission created in 1902 (32 Stat. 373), rendered a report in which it was recommended that the amount of water thereafter to be diverted from the Niagara River above the Falls of Niagara on the American side should be limited to 18,500 cubic feet per second (c. f. p. s.), and that permits should be granted to users located on the American side as follows:

Niagara Falls Power Company	8,600 c. f. p. s.
Niagara Falls Hydraulic Power & Manufacturing Company (the predecessor of the Hydraulic Power Company of Niagara Falls)	9,500 c. f. p. s.
Erie Canal and its tenants	400 c. f. p. s.
Total	18,500 c. f. p. s.

The Burton law (34 Stat. 626) authorized the Secretary of War to grant permits for the diversion of 15,600 c. f. p. s. of water from the Niagara River. Pursuant to this statute, the Secretary of War issued the following permits for a limited period of time:

Niagara Falls Power Company	8,600 c. f. p. s.
Niagara Falls Hydraulic Power & Manufacturing Company	6,500 c. f. p. s.
Erie Canal and its tenants	500 c. f. p. s.
Total	15,600 c. f. p. s.

[fol. 61]

VI

In May, 1910, a treaty between the United Statess and Great Britain, governing the taking of water from the Niagara River, was promulgated (36 Stat. 2448). This treaty provided that the United States might authorize the diversion from the Niagara River above the Falls in the State of New York for power purposes of an amount of water not exceeding in the aggregate a daily diversion at the rate of 20,000 c. f. p. s., and the Dominion of Canada might authorize a like diversion of water from the Niagara River in the Province of Ontario for power purposes not exceeding in the aggregate a daily diversion at the rate of 36,000 c. f. p. s. This treaty remained in force unmodified, at all times material to this action.

VII

At all times between August 16, 1907, and March 4, 1913, the power company was authorized by the Secretary of War, acting pursuant to statutes or resolutions of Congress, to divert water in the amount of 8,600 c. f. p. s. from the Niagara River above the Falls of Niagara. The United States did not undertake to issue any licenses covering the diversion of water from the Niagara River above the Falls between March 4, 1913, and January 19, 1917. During this period the power company continued to take from the Niagara River the amount of water it had theretofore been taking and no objection to such diversion was ever made by the United States.

On January 19, 1917, the Secretary of War issued to the power company the following license:

"Permit for Additional Diversion of Water from the Niagara River

"Subject to the provisions of the joint resolution of Congress, approved January 19, 1917,[1] 'authorizing the Secretary of War to issue temporary permits for adldditional diversion of water from the Niagara River,' permission, revocable at will, is hereby given the Niagara Falls Power Company, of Niagara Falls, New York, to divert water

[1] 39 Stat. 867.

for power purposes additional to the eight thousand six hundred (8,600) cubic feet per second, the amount of water being diverted by said company on the date of the approval of said resolution, such additional amount not to exceed a daily diversion at the rate of one thousand four hundred (1,400) cubic feet per second. This permit, unless sooner revoked, shall expire in any event with the thirtieth day of June, nineteen hundred and seventeen, and is subject to further conditions as follows: * * *"

Under date of July 2, 1917, the following letter was directed to the power company:

The Niagara Falls Power Co., Niagara Falls, N. Y.

GENTLEMEN: The following notation has been added to the department's copy of the permit of January 19th, 1917, to the Niagara Falls Power Company for additional diversion of water from the Niagara River:

[fol. 62] "War Department, June 30, 1917. In accordance with the provisions of S. J. Res. 13, 65th Congress,[2] approved this date, the foregoing permit is hereby continued in force until July first, 1918, subject to all of the conditions and restrictions therein contained, prompt report of all additional power furnished under this extension to be made in the manner specified in condition one.

"Newton D. Baker, *Secretary of War.*

"By direction of the Chief Engineers.

"Very respectfully, C. Keller, *Lt. Col., Corps of Engineers.*"

On July 1, 1918, the Secretary of War issued the following permit to the power company:

"Permit for the Diversion of Water from Niagara River for Power Purposes

"Subject to the provisions of the joint resolution of Congress, approved June 29, 1918,[3] authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River, permission, revocable at will by the Secretary of War, is hereby given the Niagara Falls Power

[2] 40 Stat. 241.
[3] 40 Stat. 633.

Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of ten thousand cubic feet per second, and that this permission shall be subject to further conditions, as follows: * * *."

This permit of July 1, 1918, continued in effect until July 30, 1919, when the Secretary of War issued another permit to the power company (consolidated) covering the diversion of 19,500 cubic feet of water per second from the Niagara River.

At no time were these licenses or any of them ever modified or revoked.

The act of June 29, 1906, 34 Stat. 626, commonly known as the Burton Act, in section 5 provides that the provisions of the act should remain in force for three years from the date of passage unless sooner revoked by the Secretay of War. The act was extended by joint resolutions of the Senate of March 3, 1909, 35 Stat. 1169, for two years, and by joint resolution, 37 Stat. 43, approved August 22, 1911, extending the time until March 1, 1912, and by joint resolution, 37 Stat. 631, approved April 5, 1912, extending time to cover the period from March 1, 1912, to the 4th day of March, 1913.

VIII

On the 7th day of March, 1896, the power company executed a deed, which is duly recorded, conveying a tract of land to the paper company, copy of which deed is attached [fol. 63] to plaintiff's amended petition as Exhibit B, and is made a part hereof by reference.

On said date the power company executed a lease, which is duly recorded, and copy of which is set out as plaintiff's Exhibit C and made a part hereof by reference.

On January 1, 1898, the plaintiff procured from Niagara Falls Paper Company a deed, copy of which is attached to plaintiff's amended petition as Exhibit D, and is made a part hereof by reference.

On June 1, 1898, plaintiff procured from the Niagara Falls Power Company an agreement attached to plaintiff's amended petition as Exhibit "E" and made a part hereof by reference.

The paper company from time to time duly exercised the option contained in the lease of March 7, 1896, and took and used additional blocks of water in accordance therewith. In January, 1918, the paper company at its Niagara Falls mill was taking and using from the main power canal of the power company an amount of water sufficient to develop 8,156.25 horsepower. This was equivalent to approximately 720 c. f. p. s. of water. During the several years preceding 1918, the paper company had paid to the power company for the right to take and use this amount of water an annual rental of $75,562.50.

The tract of land upon which the Niagara Falls Mill was located was separated both from the Niagara River and the main power canal of the power company by a strip of land reserved by the power company at the time of the grant of the Niagara Falls Mill tract in 1896. The paper company's property did not touch the Niagara River at any point, and there was no source from which the paper company could obtain water for the purpose of running the Niagara Falls Mill other than the power canal of the power company.

At the time of the shutdown in February, 1918, hereinafter described in detail, the machinery with which the Niagara Falls Mill was equipped for developing its needed power could be driven only by water power applied directly. The use of steam in place of water as the source of power would have been impractical because of the prohibitive cost. On account of existing war conditions and because the manufacture of newsprint paper was considered by the Council of National Defense as a nonessential industry, it was impossible to obtain either electric-power machinery in replacement of the water-driven machinery or the electric power with which to run such machinery. At this time the usefulness of the Niagara Falls Mill as a going concern was dependent wholly upon its ability to obtain water from the power canal of the power company.

IX

During the latter part of 1917 it was brought to the attention of the Secretary of War that there was a disposition on the part of the Canadian Power Administrators to forbid the exportation to the United States of power developed on the Canadian side of the Niagara River at Niagara Falls. The Secretary of War was advised that if this should be done it would seriously interfere with many industries located in and around Niagara Falls which were essential to the war activities of the United States. One of the reasons for this attitude of the Canadian authorities was [fol. 64] the feeling on their part that a portion of the power generated at Niagara Falls was being used for industries which were not essential for the prosecution of the war. At or about this time the Secretary of War appointed Robert J. Bulkley to act as his representative in the administration of power at Niagara Falls. He directed Mr. Bulkley to investigate the situation which was threatening there and to negotiate, inquire into, and work out the details of policies, the actual execution of which should and finally did rest with the Secretary of War.

Following numerous conferences, in which it was agreed that the manufacture of newsprint paper was a nonessential industry and should give way to the manufacture of war materials, the Secretary of War through his representatives assured the Canadian Government that he would cooperate in conserving power manufactured at Niagara Falls and devote it to war uses if the Canadian Government would agree to continue to permit power to be exported from Canada to the United States at Niagara Falls. The ultimate objective of the Secretary of War was to make the maximum use of all power available at Niagara Falls, whether developed on the American side or imported from Canada for essential war uses to the extent that power was needed for them, and to give priority in respect of power to the essential industries.

X

On December 10, 1917, Robert J. Bulkley, acting in his capacity as legal adviser of the War Industries Board and the Council of National Defense and as the personal rep-

resentative of the Secretary of War, wrote to F. L. Lovelace, secretary of the power company, as follows:

Council of National Defense, Washington

December 10, 1917.

F. L. Lovelace, Esq., Niagara Falls Power Co.,
Niagara Falls, N. Y.

DEAR MR. LOVELACE: We have been somewhat delayed in getting out our orders in the Niagara Falls power situation, as some reports that we have called for are just coming in now.

* * * * * * *

Kindly advise us immediately of the rights of the International Paper Company to take water from your company's canal. I would appreciate your sending us copies of any contracts or agreements existing between your company and the International Paper Company on this subject.

Very truly yours, Robert J. Bulkley.

On December 13, 1917, F. L. Lovelace, secretary of the Niagara Falls Power Company, in response to the letter above set out, wrote Mr. Bulkley as follows:

The Niagara Falls Power Company

December 13, 1917.

Hon. Robert J. Bulkley, Council of National Defense,
Washington, D. C.

DEAR MR. BULKLEY: Your letter of the 10th inst. is received and its contents have been noted with interest.

[fol. 65] International Paper Company

By warranty deed dated March 6, 1896, this company conveyed to Niagara Falls Paper Company 11.75 acres of land (about opposite the entrance of our intake canal) "together with three thousand horsepower." By a separate indenture under the same date this company agreed to permit the paper company to take and discharge as specified in the agreement additional amounts of water for the pro-

duction of power "up to the full amount of the capacity of the present discharge tunnel" of the paper company.

The paper company definitely called for an aggregate of 7,200 h. p. Measurement made in the manner provided in the agreement, however, indicated the capacity of the paper company's tunnel and that company's actual use to be 956.25 h. p. in excess of the 7,200 h. p. definitely called for.

The measurenemts were accepted and for several years past invoices and payments have been based thereon. The paper company pays for 3,000 h. p. provided under the terms of the deed at the rate of $8 per h. p. per year, and for the remaining 5,156.25 h. p. it pays at the rate of $10 per h. p. as provided in the agreement.

With the consent of this company and, I understand, by written grants the International Paper Company has duly succeeded to all the estate and rights of Niagara Falls Paper Company.

The current terms of renewals of the rights under the agreement will expire October 1, 1926, and, pursuant to the terms of the agreement, the paper company has the further option to renew for additional terms extending not later than January 1, 1936. Corporate.

I am sending you under separate cover, together with a carbon copy hereof, copies of the following instruments:

(1) Deed executed by the Niagara Falls Power Company to Niagara Falls Paper Company, dated March 7, 1896, and recorded in Niagara County clerk's office April 9, 1896, in book 242 of deeds at page 232.

(2) "Lease of additional power," being an agreement executed by and between the Niagara Falls Power Company and Niagara Falls Paper Company, dated March 7, 1896.

(3) Agreement by and between the Niagara Falls Power Company and International Paper Company, dated June 1, 1898.

(4) "Renewal of term of agreement of March 7, 1896," executed by the Niagara Falls Power Company and International Paper Company, dated September 27, 1905.

(5) Notice signed by International Paper Company, dated December 2, 1915.

Very truly yours, F. L. Lovelace, Secretary.

XI

Subsequent to determination by the Council of National Defense that the manufacture of newsprint paper was a nonessential industry, and in view of the facts and circumstances surrounding the conditions at Niagara Falls and on December 28, 1917, the following, hereinafter referred to, respectively, as order, schedule, and temporary [fol. 66] waiver, duly signed by the Secretary of War and the president of Niagara Falls Power Company, were mutually exchanged:

Council of National Defense, Washington

December 28, 1917.

To Niagara Falls Power Company, Niagara Falls, N. Y.

SIRS: The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

Newton D. Baker, Secretary of War.

RJB—F.

Temporary Waiver of Delivery of Electrical Power of Niagara Falls Power Company

Whereas the President of the United States, by virtue of and pursuant to the authority vested in him, and by

reason of the exigencies of the national security and defense has placed an order with Niagara Falls Power Company on the 28th day of December, 1917, and on the same date has requisitioned from it the total quantity and output of electrical power which is capable of being produced and or delivered by said company through the use of all waters diverted or capable of being diverted through the intake canal of said Niagara Falls Power Company and/or the plants or machinery of said company connected therewith; and

Whereas said Niagara Falls Power Company has requested that it be permitted to carry on its business of production, importation, sale, and distribution of such power as is or may be developed, generated, or imported by it in whatever manner and to whatever extent may be deemed to be consistent with the exigencies of the national security and defense; and

Whereas in the judgment of the Secretary of War such exigencies will be provided for adequately for the time being if the electrical power hereby ordered and requisitioned from said company be sold by and for the account of said Niagara Falls Power Company and distributed by it in the manner shown in the attached schedule; and

Whereas said company has offered to waive all claim for compensation from the United States by reason of said order and requisition and or the delivery of power under the conditions set forth in the schedule hereto attached, save as to such power as actually may be delivered to the United States:

[fol. 67] Now therefore the Secretary of War, acting for and in behalf of the United States, hereby until further notice to said company, waives delivery to the United States of any of the power capable of being produced and or delivered by said company, on the express condition that said company shall distribute such power as provided in the schedule hereto attached.

Upon request of the Secretary of War, or his duly authorized representative, said Niagara Falls Power Company shall furnish a sworn statement showing the users of said power during any specified period, together with the maximum quantity of power delivered daily and the rate of compensation charged to each user, and such other information as may be requested.

Said Niagara Falls Power Company hereby waives any and all right to compensation from the United States by reason of said requisition and order and or delivery of said power under the conditions hereinbefore imposed.

In witness whereof this instrument has been executed in duplicate on the 28th day of December, 1917, on behalf of the United States by the Secretary of War and the said company has caused the same to be executed and its corporate seal attached by its president hereunto duly authorized.

Newton D. Baker, Secretary of War. Niagara Falls Power Company, by —— ——, President.

Schedule

The Niagara Falls Power Company shall deliver all electrical power, delivery of which is waived by the United State- as provided in the waiver attached, under existing contracts, to the persons now entitled to receive such power, except that delivery of electrical power to the following consumers shall be curtailed as herein indicated:

"Hooker Electric Chemical Co. Reduced to 5,100 h. p.

"Niagara River Manufacturing Co. No power between hours of 6 a. m. and 7:30 p. m."

Said Niagara Falls Power Company shall use the additional power made available by increased use of water in its canal or by the curtailments herein prescribed or otherwise, to increase the amount of electrical power deliverable to the users named below—it being the intent hereof that they shall receive respectively and continuously the approximate amounts of electrical power set opposite their respective names.

"Carborundum Company, 13,500 h. p.

"Acheson Graphite Company, 7,000 h. p.

"Niagara Electro Chemical Company, 13,500 h. p."

The foregoing table is based upon the ability of said Niagara Falls Power Company to operate its plants and line at full capacity and efficiency.

Whenever said Niagara Falls Power Company shall have a surplus of electrical power above the requirements of its customers under the provisions of the foregoing waiver

and this schedule it shall make distribution thereof to the [fol. 68] customers on its lines in the following order of priority, viz:

"Star Electrode Works.
"Acheson Graphite Co.
"Union Carbide Co.
"Oldbury Chemical Co.
"Niagara Electro Chemical Co.
"Carborundum Company.
"Phosphorus Compound Co.
"Mathieson Alkali Works, Inc.
"Hooker Electro Chemical Co.
"Niagara Alkali Co.
"Norton Company of New York.
"Aluminum Company of America.
"Buffalo General Electric Co."

In case of a deficiency in the supply of electrical power said Niagara Falls Power Company shall withdraw power first from consumers not named above and then from the several named customers in the inverse order of the foregoing list so far as the same may be done without undue damage to the plants and/or products of said several customers. There shall, however, be no curtailment of power deliverable to public utilities, or to small users employing an average of not to exceed 100 h. p. each until after all larger users shall have been curtailed as far as such curtailment may be effected without causing undue "damage."

XII

On December 29, 1917, Robert J. Bulkley, acting as the representative of the Secretary of War, wrote to Mr. Lovelace concerning the order which had been issued under date of December 28, 1917. This letter contained the following paragraph:

"Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity. Representatives of the International

Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off."

On December 31, 1917, Mr. Bulkley, acting as the representative of the Secretary of War, telegraphed F. B. Jennings, general counsel for the paper company, as follows:

"Power company has been directed to take water hitherto used by International Paper Co. * * *."

XIII

On or about December 12, 1917, the local manager of the Niagara Falls mill of the International Paper Company was notified that the water which it was then taking from the power company's canal was to be shut off as soon as the stock which was then in process of manufacture could be run out.

[fol. 69] At the time the paper company was advised that it was to be deprived of the water which it had theretofore been taking, it had on hand at its Niagara Falls mill large stocks of unfinished paper, wood pulp, etc., which it was necessary to run out if needless waste was to be prevented. Mr. Bulkley, on behalf of the Secretary of War, agreed that the paper company might continue taking sufficient water from the canal of the power company to enable it to "run out" this stock on hand.

This was not accomplished until February 7, 1918. At 12.30 a. m., February 7, 1918, the paper company ceased using water from the power canal of the power company and thereafter did not resume the use of such water until midnight November 30, 1918, when the order of December 28, 1917, was abrogated.

Between February 7, 1918, and November 30, 1918, the order of December 28, 1917, remained in effect unmodified, and the schedule accompanying the same at no time permitted or authorized the power company to deliver any water to the paper company. During this entire period the power company took and used all the water diverted from the Niagara River through its power canal and refused to deliver and did not deliver any water to the paper company.

XIV

The paper company has never been paid any compensation by the United States or by any one else on account of the water and the water rights to which it was entitled under the aforesaid deeds and leases and of which it was deprived as aforesaid between February 7, 1918, and November 30, 1918, by the United States.

XV

During 1917 and 1918, there were no sales or leases of water or water power or water rights at Niagara Falls or its immediate vicinity other than that made by the power company to the paper company as aforesaid.

XVI

Prior to the shutdown of the Niagara Falls Mill in February, 1918, the daily capacity or normal average output of this mill was 154 tons of newsprint paper per day.

XVII

In the fall of 1917 and throughout 1918, there was available for use at the Niagara Falls Mill pulp wood and other raw materials necessary for the operation of said mill throughout 1918 in the production of newsprint paper at the rate of 154 tons per day.

XVIII

In the fall of 1917 and throughout 1918, a sufficient supply of men was available for the operation of the Niagara Falls Mill throughout 1918 on the basis of an output of 154 tons of newsprint paper per day.

[fol. 70] Prior to the shutdown in 1918 the paper mill employed approximately 500 men. After the shutdown only about ten men all told remained in the mill in order to look after the steam-boiler house, fire protection, and one foreman kept on the pay roll in order that he might be held. These ten employees acted in the nature of caretakers.

XIX

Throughout 1918 the demand for newsprint paper of the kind manufactured at the Niagara Falls Mill was greater than the paper company could supply, and the condition of the market for newsprint paper throughout 1918 was such that it would have absorbed the entire output of the Niagara Falls Mill during that period if that mill had been able to operate at its full capacity of 154 tons of newsprint paper per day.

XX

In the fall of 1917 and throughout 1918 prices for newsprint paper were rising. The sales prices of newsprint paper in carload lots during 1918 were as follows:

"January 1, through March 30, 1918—$60 per ton, f. o. b. mill.

"April, 1918—$70 per ton, f. o. b. mill.

"May 1, through June 30, 1918—$72.65 per ton, f. o. b. mill.

"July 1, through December 31, 1918—$75.05 per ton, f. o. b. mill."

XXI

In the fall of 1917 the paper company, in making contracts for the sale and delivery of newsprint paper during 1918, relied upon the expected 1918 output of the Niagara Falls Mill of 154 tons of newsprint paper per day. Because of the shutdown of the Niagara Falls Mill, the paper company requested certain of its contract customers to cut down on their contract commitments.

Some of them complied with this request and the company was able to and did satisfy, from other plants operated by it, the commitments remaining.

XXII

Between February 7, 1918, and December 1, 1918, the Niagara Falls Mill of the paper company sustained an actual out-of-pocket or direct overhead expense of $304,685.26 on account of the shutdown. This loss would not have

been sustained if the mill had been able to operate during the period of the shutdown. It does not satisfactorily appear what loss of profits, if any, the plaintiff sustained by reason of its plant being closed during a portion of the year 1918.

XXIII

At all times between November 1, 1917, and January 1, 1919, the demand for power at Niagara Falls for exceeded the available supply. During this period the standard price for electric energy supplied by the Niagara Falls Company [fol. 71] in the city of Niagara Falls, not in renewal of preexisting contracts, was at the rate of $20 per horsepower per annum. Between February 7, 1918, and November 30, 1918, large consumers of electrical power at Niagara Falls purchased and used blocks of power ranging from 1,600 horsepower to 14,000 horsepower and paid for such power at a rate varying between $33 and $47.05 per horsepower per annum. Any additional power which might have been available at Niagara Falls between February 7, 1918, and November 30, 1918, would have commanded a price of not less than $47.05 per horsepower per annum.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him.

Opinion

Graham, Judge, delivered the opinion of the court:

The plaintiff is claiming damages as just compensation for the taking of its property by the defendant for public use. The alleged taking, stating it in a general way, is the action of the defendant in preventing it from getting water to generate its power for its plant from the canal of the

Niagara Falls Power Company under leases and claimed rights from the latter company. The defendant defends upon the grounds:

(1) (*a*) That there was no taking of the plaintiff's property;

(*b*) That the water and its consequent power, if taken, were not private property, but were under the control of the United States Government;

(*c*) That if it was taken, it was not for a public use, that the United States did not use it, and it was distributed to private industries which were aiding in the prosecution of the war;

(2) That if the plaintiff was damaged the damage was consequential, under the Omnia Commercial Co. case, 261 U. S. 502, and its injury was incidental to the exercise of sovereign power, as the Government, if it requisitioned, requisitioned only the product of the Niagara Falls Power Company;

(3) That the use of the water in the Niagara River for power purposes is controlled by stipulation in a treaty between the United States and Great Britain ratified May 5, 1910, prior to the action herein complained of, and that the plaintiff is barred under section 153 of the Judicial Code;

(4) That whatever was secured by the Government from the Niagara Falls Power Company was secured by reason of a contract with that company wherein it waived all claim for damages by reason of any requisition proceedings and consented to deliver its power to private individuals as directed in the agreement, and that if the plaintiff has any right of action it is against the Niagara Falls Power Company by reason of this contract;

[fol. 72] (5) That under this contract, if the Government exercised any right it was merely the right to direct how the power of the Niagara Falls Power Company should be used, and to what individual manufacturers it should be distributed in connection with and to promote the prosecution of the war and the national defense; and

(6) That if there was a taking it was under a claim of right.

The plaintiff owned a plant for the manufacture of paper, located above and near the falls of the Niagara River, which was operated by water power. This power was secured through an intake opening on a canal constructed above the Falls and owned and operated at the time by another corporation, the Niagara Falls Power Company. The plaintiff's property did not abut on this canal and was separated from it by a street. The water was passed through an intake from the canal to and down a chute extending some distance below its level to machinery which was propelled by the force of its fall, and the water carried out through a small runway into the main runway of the Niagara Falls Power Company, and from there to the river below the Falls. It had secured the right to use the water from the canal by a contract with the Niagara Falls Power Company, which allowed it to take sufficient water to generate a certain number of units of power.

The Niagara Falls Power Company, prior to the execution of said contract, had constructed a canal in the nature of a cul de sac on its own land, and connected with the waters of the Niagara River above the Falls, and in such a way that the water ran into this canal up to the level of the river. Near the end of the canal it had constructed a chute which carried the water some distance below the surface, and as in the case of the International Paper Company it turned machinery which generated power. It had also its own underground runway above mentioned, which carried this water off and into the river below the Falls. Its business was producing power and selling it for manufacturing, lighting, and other purposes. It did not manufacture anything but power. Its product was power.

The Niagara Falls Power Company was using the water which passed into its canal under a license from the United States granted by the Secretary of War by virtue of the authority given him under the act of June 29, 1906; 34 Stat. 626, known as the Burton Act. This license limited said company to the use of water sufficient to produce a certain number of units of power. The license was revocable at the will of the Government and discretion of the Secretary of War.

The Niagara River was in the nature of an international boundary between the United States and Canada, and under a treaty of May, 1910, between the United States and Great Britain, was open to the joint and unrestricted use for navigation and all necessary control of navigation as might be determined by joint action. And under treaty, also, between these countries a limit was placed on the amounts of water that could be taken by each of them from the Niagara River for the production of power; that is, each was allowed to use water up to certain units of power. So that this treaty, as was intended, placed the control of the water of the river for power purposes under the control of the two governments, and, being a treaty, it is part [fol. 73] of the supreme law of the land. We have, then, the Government of the United States, by treaty, obligated to limit on its side the amount of water to be taken from the Niagara River for power purposes and assuming control. But, aside from the treaty, as beween the States and its citizens the Government had the right to control the use of power and the building of dams and structures necessary to generate power in the navigable waters of the United States, of which the Niagara River was a part. Congress on June 10, 1920, 41 Stat. 1063, passed the Federal Power Commission act, sometimes designated as the water power act, which imposed penalties for its violation and appointed a commission to control and pass upon permits. The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the act. In view of this conclusion of Congress as to its constitutional right to control water for power, this court will not undertake to say that it has not the power therein asserted and exercised.

We further see that the Niagara Falls Power Company was securing water for its canal under a revocable license under the Burton Act, supra. Had the license been revoked, as it could have been at any time, its ability to produce its power would have ended, and the right to use the water in the canal would have terminated, as would the plaintiff's

right as its lessee. The plaintiff had no right to use or connect with the water in said canal of the Niagara Falls Power Company except by contract with that company, and the right which was granted under the contract would give the plaintiff no higher rights than were possessed by the power company. And had the United States revoked the permit of the power company, which would have in effect canceled the contract of the plaintiff with that company, it is plain that the plaintiff could have had no action either against that company of the Government which canceled the license.

The Council of National Defense, under authority of the act of August 29, 1916, chap. 418, 39 Stat. 649, was granted authority to make recommendations to the President and heads of departments, among other things, as to the "utilization of waterways, the increase of domestic production of articles and materials essential to the support of the Armies and of the people during the interruption of foreign commerce." Prior to the issue of the so-called commandeering order by the Secretary of War, hereinafter mentioned, the Council of National Defense had held that the production of print paper was not an essential industry to the support of the Army and the conduct of War, and at the time of the issuance of the order much of the power produced by the Niagara Falls Power Company was being used for this purpose, and for the same purpose power secured from Canada was being used, and the Canadian Government had suggested that this latter power was not being used to operate industries which aided in the prosecution of the war.

Thereupon the Secretary of War, by authority of the President, on December 28, 1917, issued an order to the [fol. 74] Niagara Falls Power Company, which stated that the President "hereby requisitions the total quantity and output of the electrical power which is capable of being produced or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal or your plants and machinery connected therewith. You are directed to make immediate and continuous use of such power until further notice." With this order was filed what was called a temporary "waiver" or contract by the Niagara Falls Power Company which was the result of prior negotiations. It recited the requisition just men-

tioned, and, further, "that the Niagara Falls Power Company had requested to be permitted to carry on its business of production, importation, sale, and distribution of such power" as it could develop consistent with the exigencies of national security and defense, and that the Secretary of War felt that such exigencies would be provided for if the power company would distribute all the power which it was capable of producing in the manner indicated in an attached schedule, which schedule gave the names of certain plants to which power was to be distributed and furnished. The plaintiff's name was not among those named and by virtue of this agreement between the Secretary of War and the power company it would be cut off and was cut off from taking water for its power plant under its contract with the power company, as the latter was to use all the water that the Government under the license allowed to be taken.

This waiver or, rather, contract, for contract it was, further recited that the Niagara Falls Power Company had offered to waive all claims for compensation from the United States by reason of said order and requisition, and it agreed to deliver the power under the conditions set forth in said schedule. The contract provided that in view of the facts recited the United States Government waived delivery, until further notice, to the United States of any power upon condition that it be distributed to the parties named in the schedule, and the power company waived any and all right to compensation from the United States by reason of said requisition order, or the delivery of power under the conditions named in this contract.

It will be seen that the Niagara Falls Power Company, without the permit from the Government, or in case of the cancellation of the permit, would be operating illegally and the rights of the plaintiff against the United States could not be better or other than those of the Niagara Falls Power Company. Instead of cancelling the permit of the power company by not including the plaintiff in the schedule, the permit which the plaintiff had secured by its contract with that company was frustrated. If the Government had the right to cancel as to the Niagara Falls Power Company, it had the right to cancel as to plaintiff. Whatever the action which it took may be called, it proceeded under a claim of right. Tempel v. United States, 248 U. S.

121; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; and Natron Soda Company case, 257 U. S. 138. It follows also in this connection that if the Government assumed control of, or was obligated to control, the use of water from the Niagara River for power purposes under the aforesaid treaty with Great Britain, it had this right of control under the Constitution and was exercising it by virtue of the aforesaid Federal Power Commission act (June 10, 1920).

[fol. 75] But, aside from this view of the matter, if the foregoing considerations were not in the case, the plaintiff could not recover, (1) because it was deprived of its contract with the Niagara Falls Power Co. by a contract which the latter company voluntarily entered into with the United States, and if it had any right of action it would be against that company; (2) what the Government took by the requisition order, if it took anything, was the product of the Niagara Falls Power Company. It did not take its plant or the use of it. It did not take its canal. It took what power it could produce and was producing from the entire plant; that is, as stated, it took the product of the plant, not the plant.

By reason of the alleged taking, the contract to furnish so much water to the plaintiff was frustrated, not taken. The situation, as far as the principle involved is concerned, is the same as in the Omnia Commercial Co. case, 261 U. S. 502, 511. The damage to the plaintiff was incidental. The Government did not take plaintiff's plant or its contract with the Niagara Falls Power Company, nor did it intend to take it.

In this case the Government, if it took anything, did not take the res, as it was held in the Duckett case, 266 U. S. 149, that it did. There it took over the whole terminal plant, and the plaintiff was the lessee of a portion of it, and it was held that the taking over of the res took his lease, which was a part of the res, but in the case at bar the Government did not take the res, it did not take over the plant or its operation or its use. It simply commandeered the output or product of the plant, that is, such power as the plant under the conduct and management of the company was able to turn out, and this is as close to what was done in the Omnia Commercial case, supra, as we could

well have it without having the identical facts. In that case plaintiff had a contract antedating the taking, under which the company was to furnish it so many tons of steel at a given price for which it had already paid. The court held that the contract was not taken, but frustrated, and that it was an incidental loss for which there was no recovery, a loss incident to the legitimate exercise of a sovereign right by the Government.

But, further, by the subsequent contract with the Niagara Falls Power Company by which the plaintiff was deprived of its rights, the Government did not even appropriate or receive the product, as in eminent domain, of the Niagara Falls Power Company for public use, but, on the contrary, it was furnished to and received by those corporations named in said schedule, with the consent of said company. It controlled the distribution of the product under a contract with that company, in which contract that company expressly waived all claims for damage, if any there were, by reason of the previous requisition to which this contract was the successor. The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned.

In 1902 an international waterways commission, composed of three representatives of the United States and three representatives of the Dominion of Canada, was created, 32 Stat. 373, which recommended that the amount of water [fol. 76] to be taken on the American side from the Niagara River above the Falls should be limited to 18,500 cubic feet per second. Thereafter Congress asserted its constitutional right to control water of navigable streams within the control of the United States. On June 29, 1906, it passed what was known as the Burton Act, 34 Stat. 626, which authorized the Secretary of War to grant permits for the diversion of 15,600 cubic feet per second from the Niagara River. The Niagara Falls Power Company applied for and was granted revocable licenses beginning August 16, 1907, and from time to time they were renewed by joint resolutions of Congress. Under date of January 19, 1917, a license revocable at the will of the Secretary of War was granted, and on

July 1, 1918, a further revocable license was granted authorizing the diversion by the Niagara Falls Power Co. and the Hydraulic Power Co., a subsidiary of said company, of practically 97½% of the amount of power allotted to the United States under the said treaty, and thereafter, on July 30, 1919, another revocable permit or license was granted the said Niagara Falls Power Co. for not exceeding 19,500 cubic feet, being the aggregate of what had hitherto been allowed to that company and the said Hydraulic Power Co.

In 1920 Congress passed the water power act, supra, asserting control of the use of water in navigable waters for water power.

If the United States Government in entering into the treaty of May, 1910, with the British Government, by which it undertook to control and limit the use of the Niagara River for water power, was within the limits of its constitutional power, and if aside from this treaty, which is the supreme law of the land, Congress had constitutional power and had exercised it by the Burton Act and Federal Power Commission Act, supra, to control and limit the use of said waters for said power purposes, then the contention of the plaintiff that it had a vested right under sundry conveyances and the law and decisions of the courts of New York to take and use water from the Niagara River can not be sustained; and it would be extending this opinion beyond necessary limits to discuss these rights. Suffice it to say that whatever these rights may be under the law and decisions of New York, and the conveyances of title to plaintiff, we do not think that they can be asserted or are or can be of avail against the conclusions which we have reached as to the controlling effect, as far as this case is concerned, of the said treaty with Great Britain and action of Congress in exercising its power to control said waters.

To sum up our conclusions: The Government did not, and did not intend to, take the plaintiff's property. If it be held that it took the property of the Niagara Falls Power Company, the loss of the plaintiff was incidental to the exercise of a sovereign right. By the contract with the Niagara Falls Power Company the Government secured the distribution of the power of that company to individuals

in aid of the prosecution of the war. If it be held that it did take the property of the Niagara Falls Power Company, it took it under a claim of right by virtue of the authority of the Constitution and the said acts of Congress giving it control of water power. It did not take control of the product and output of the Niagara Falls Power Company without its consent, but, on the contrary, with and by its [fol. 77] consent, by contract, and not for the public use of the United States in its corporate capacity but for the use of certain citizens thereof in the aid of national security and defense.

Inasmuch as we hold that there was no taking, it is not necessary to pass upon the question whether the Lever Act applies or not and whether this court has jurisdiction.

The petition should be dismissed, and it is so ordered.

Green, Judge, and Booth, Chief Justice, concur.

[fol. 78] VI. JUDGMENT

At a Court of Claims, held in the City of Washington on the 4th day of November, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount of which to be ascertained by the clerk and collected by him according to law, which amount is found to be $411.26.

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,729. Court of Claims. Term No. 598. International Paper Company, Petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed January 23, 1930. File No. 34,729.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 14, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3493)

FILE COPY

FILED
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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 37

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

INTERNATIONAL PAPER COMPANY, Petitioner, vs. THE UNITED STATES, Respondent.	No. 598.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Jurisdiction.

The Court of Claims announced its special findings of fact, dismissed the petition and entered judgment against the petitioner for the cost of printing on November 4, 1929. The Court's findings of fact and opinion are not yet reported. They appear at Record 47 (Findings) and Record 65 (Opinion).

Jurisdiction is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U. S. C., t. 28, s. 288).

Statement of the Facts.

The petitioner makes paper and paper products. One of its mills is located at Niagara Falls, New York, near the Niagara River, about a mile above the Falls (Find. I, R. 47).

In the fall of 1917, the machinery used in the manufacturing operations at the Niagara Falls mill was operated by and adaptable only for the use of water power applied directly. The petitioner had in use six water-wheels, located approximately 175 feet below the surface. The water turning these water-wheels was drawn from the main power canal of the Niagara Falls Power Company at a point some 200 feet from where the power canal tapped the Niagara River. The petitioner's right to draw off and use this water arose under a series of deeds and leases from the Niagara Falls Power Company dating back to 1896, which were duly recorded and sufficient to pass an estate in realty under the law of New York. The sketch (R. 14A) attached to the amended petition herein as Exhibit A shows the physical situation (Find. II, R. 47, and Find. VIII, R. 53).

In the fall of 1917 the Niagara Falls Power Company was diverting some 10,000 c.f.p.s. of water per day from the Niagara River (Find. VII, R. 51). Of this amount 720 c.f.p.s. went to the petitioner's mill under the deeds and leases and the balance was used by the Power Company to generate electrical power in its own plant for sale to the users thereof (Find. VIII, R. 54). The Power Company's right to divert and use water from the Niagara River arose under (a) private grants in fee of the lands bordering on the Niagara River adjacent to the point of intake and inclusive thereof, (b) letters patent from the State of New York granting to the Power Company certain lands under water in the bed of the Niagara River, and (c) special Acts of the State of New York conferring upon the Power Company the right to take, sell and lease water from the Niagara River (Find. IV, R. 49). Among its specified charter powers, the Power Company had the right to convey lands and to sell, lease and supply water from the Niagara River or power to be developed therefrom for manufacturing, electrical or power purposes (Find. III, R. 48).

In the fall of 1917 the Secretary of War undertook to investigate the power situation at Niagara Falls, due largely

to the attitude of the Canadian authorities in threatening to stop the importation of power from the Canadian side (Find. IX, R. 55). During the course of this investigation the Secretary of War became fully advised of the operations of the petitioner's Niagara Falls mill and its water rights under the deeds and leases with the Power Company (Find. X, R. 55-58). On December 28, 1917, the Secretary of War, under the authority of the President and "by reason of the exigencies of the national security and defense", issued a requisition order addressed to the Niagara Falls Power Company requisitioning "the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal". It was expressly stated that just compensation would be paid (Find. XI, R. 58).

The day following the Secretary of War wrote to the Power Company, stating in terms that the requisition order was "intended to cut off the water being taken by the International Paper Company", and adding that the petitioner's representatives had already been advised of the contemplated action, which was the case (Finds. XII, R. 61, and XIII, R. 62).

With the requisition order, but quite separate and distinct therefrom, there was delivered to the Power Company a document styled a temporary waiver and a schedule. The waiver, after reciting the requisition, stated that the Power Company requested to be permitted to continue to produce and sell power and that the Secretary of War believed that the exigencies of the national security and defense would be met if the electrical power requisitioned be sold by and for the account of the Power Company and distributed to the industries as specified in the attached schedule. The United States then agreed that it would waive delivery of any and all power on the conditions stated, and the Power Company agreed that it would waive any and all right to compensation on the conditions stated. The petitioner was not among the industries listed in the schedule to whom electrical power was to

be delivered, and was not a party to this agreement (Find. XI, R. 58-61).

As a result of the Government's action the petitioner, on February 7, 1918, was forced to cease using any water from the Power Company's canal, and shut down its mill. It did not resume the use of such water until November 30, 1918, when the requisition order of December 28, 1917, was abrogated. During this period the requisition order remained in effect unmodified. The schedule accompanying the so-called waiver at no time permitted the Power Company to deliver any water to the petitioner, and throughout the period the Power Company took and used all the water diverted from the Niagara River for the purposes dictated by the Government (Find. XIII, R. 62).

No compensation has ever been paid to the petitioner by the United States or by anyone else (Find. XIV, R. 63). The Court of Claims specifically found that the petitioner had sustained an actual out-of-pocket or direct expense of $304,685.26 on account of the shut-down, which would not have been sustained if the mill had been able to operate during the period (Find. XXII, R. 64).

There are certain additional facts which should be mentioned in view of the Court of Claims' opinion. In May, 1910, a treaty between the United States and Great Britain was promulgated, limiting the diversion of water from the Niagara River for power purposes on the American side to a daily diversion of 20,000 c.f.p.s. (Find. VI, R. 51; 36 Stat. part 2, p. 312). Under the Burton Law, passed in 1906 (Act of June 29, 1906, c. 3621, 34 Stat. 626), and a series of joint resolutions extending its operation, the Secretary of War from time to time issued to the Power Company a series of so-called permits or licenses covering the diversion of water from the Niagara River. The license of January 19, 1917, extended on July 2, 1917, to July 1, 1918, gave the Power Company permission to divert daily 10,000 c.f.p.s. On July 1, 1918, a similar license was executed running until June 30, 1919, permitting diversion at a like rate. These licenses

stated that they were revocable at will. At no time were any of these licenses revoked or modified (Find. VII., R. 51-53).

Some two years after the asserted taking, namely, in June, 1920, Congress passed the so-called Federal Water Power Act, under which a Federal Power Commission was created and a system of licensing provided for (Act of June 10, 1920, c. 285, 41 Stat. 1063, U. S. C., t. 16, §§ 791-823).

Specifications of Error.

The ultimate error assigned is that the Court of Claims erred in holding as a matter of law upon the facts found that the petitioner was not entitled to compensation for the damages sustained. The detailed specifications of error are set forth in the petition under the heading "Questions Presented" (R. 3).

ARGUMENT.

POINT I.

The petitioner's right to the use of the water was not a contractual right *in personam*; it amounted to a present estate in the nature of a leasehold of realty.

The character of petitioner's rights in the use of the water is determined by the laws of the State of New York. *Fox River Co.* v. *R. R. Comm.*, 274 U. S. 651, 655; *Port of Seattle* v. *Oregon and W. R. R.*, 255 U. S. 56, 63; *United States* v. *Cress*, 243 U. S. 316, 319; *St. Anthony Falls Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358; *Barney* v. *Keokuk*, 94 U. S. 324; *Packer* v. *Bird*, 137 U. S. 661; *Shively* v. *Bowlby*, 152 U. S. 1. In the *Fox River Company* case Mr. Justice Stone said (p. 655):

> "* * * the nature and extent of the rights of the state and of riparian owners in navigable waters within

> the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state".

Under the New York decisions, the water rights of the Power Company were vested property rights so far identified with realty as to constitute a corporeal hereditament. *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38; *Lawrence* v. *Whitney*, 115 N. Y. 410; *Tracy Development Co.* v. *Becker*, 212 N. Y. 488; *Van Etten* v. *City of New York*, 226 N. Y. 483; *Waterford, etc., Co.* v. *State*, 239 N. Y. 629, affirming without opinion 208 App. Div. 273; *Gould: Treatise on Waters*, 3d Ed. Ch. VI, page 394. In the *Van Etten* case, *supra*, the Court said (p. 486):

> "The right of the owner of riparian land to the natural flow of water in a stream along the land is a corporeal hereditament and is an incident to and is annexed to the land as part and parcel of it. It is not, and is more than, an easement. The right is usufructuary. It is properly classified at common law, equally with the land itself, as real property".

Being a hereditament, the New York Statutes classify water rights as real property. *New York Real Property Law*, Sec. 2, L. 1909, ch. 52; *New York General Construction Law*, Sec. 40, L. 1909, ch. 27.

Moreover, by special grant of the New York Legislature, the Power Company was expressly given the right to take, use, store, sell and lease water from the Niagara River. Ch. 109 of the Laws of 1889 (quoted *infra*, Appendix, p. 14); Ch. 513 of the Laws of 1892 (quoted *infra*, Appendix, p. 14); Ch. 477 of the Laws of 1893 (quoted *infra*, Appendix, p. 14). In view of the common law of New York and this express Legislative grant, the Power Company's right in the use of the water was unquestionably an interest or estate in realty, and such has been the express holding of the New York Court of Appeals. *People ex rel. Niagara Falls Hydraulic Manufacturing Company* v. *Smith*, 175 N. Y. 469,

affirming without opinion 70 App. Div. 543 (holding that water rights identical in character are taxable as real property).

Partly by grant in perpetuity and partly by lease for a period of years the Power Company conveyed to the petitioner the right to take and use part of the water drawn by the Power Company from the Niagara River. In doing so the Power Company was acting in accordance with its charter from the State of New York, which expressly authorized it among other things to convey lands and to sell, lease and supply water taken from the Niagara River. Having an estate of a real nature in the use of the flowing water, the Power Company carved out and conveyed to the petitioner a lesser estate, but none the less a present estate in realty. The petitioner, as grantee and lessee of the Power Company, enjoyed something more than a contractual right *in personam*. It had acquired and at the time of the requisition it possessed a vested right of a real nature in the flowage of the water.

The New York courts fully recognize the validity of a conveyance in part. In *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38, 46, the Court of Appeals, speaking of the right to use the water of a flowing stream, said:

> "It is a valuable property right which can be severed from the riparian land by grant, condemnation, relinquishment or prescription".

POINT II.

The taking of the petitioner's right to use the water was the taking of private property.

The water rights of the petitioner were without doubt taken, and intentionally taken, during the ten months' period in which the requisition order remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment,

for which, if taken, compensation must be paid. *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Wayne County*, 252 U. S. 574; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *North American, etc.*, v. *United States*, 253 U. S. 330; *James* v. *Campbell*, 104 U. S. 356; *Central Trust Co.* v. *Hennen*, 90 Fed. 593; *Williams* v. *United States*, 104 Fed. 50.

In *Duckett & Co.* v. *United States*, 266 U. S. 149, the Secretary of War, by formal requisition, took over the Bush Terminal Docks in Brooklyn. The plaintiff in that case was the lessee of one of the piers. This Court, reversing the Court of Claims, awarded compensation for the taking. In *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, the plaintiff had an executory contract with a steel company for the delivery of steel. The United States requisitioned the entire output of the steel plant. This Court held that the plaintiff was without recourse, since its contract had not been taken but was merely frustrated.

The Court of Claims erred in applying the *Omnia* case and in distinguishing the *Duckett* case. The order of December 28, 1917, requisitioned "the total quantity and output of the electric power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal". Clearly, the taking was a taking of the use of all the water being drawn from the Niagara River. Equally clearly, this taking included the taking of the petitioner's water, a fact of which the Secretary of War knew at the time and a result which he intended. The requisition order undertook in terms to pay "fair and just compensation". The case is squarely within the ruling in the *Duckett* case. If the petitioner's right had been in the nature of an executory contract calling for the delivery of electrical power, there might have been some ground for applying the *Omnia* case. But the petitioner enjoyed a leasehold in the use of the water. The requisition order took this leasehold, to the same extent and effect as the

requisition order in the *Duckett* case took the plaintiff's lease of the pier.

As this Court said in the *Duckett* case (p. 151):

> "Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 184. *Farnsworth* v. *Boston*, 126 Mass. 1, 8. In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun".

POINT III.

The taking was not accompanied by any revocation of the Federal license, and the express promise to pay just compensation negatives any taking under a claim of right.

The Court of Claims found specifically that the Federal licenses in effect during the period of the taking were never revoked. On the contrary, the license in effect when the taking occurred terminated on July 1, 1918, and on July 1, 1918, a new permit running until July 30, 1919, was issued. If the rights of the Power Company or the petitioner were in anywise dependent upon the existence of a Federal license, which we respectfully deny, the record is clear that in taking the property the Government did not proceed as by revocation of the license.

The requisition order in terms undertook to pay fair and just compensation. This express promise made to the lessor certainly negatives any taking under a claim of right. When

made with knowledge of the lessee's rights and with the intention of depriving the lessee of such rights, it implied a promise to pay the lessee compensation in respect of its property taken.

POINT IV.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its rights to compensation in respect of its own property.

The order of December 28, 1917, was an unconditional requisition. The so-called waiver accompanying it was a separate and distinct document. By it the Power Company waived the compensation to which the requisition expressly entitled it on condition that it be allowed to continue to supply electrical power to designated industries and collect its schedule rates. Through this device the Power Company obtained the equivalent of compensation for the taking.

But there was no identity of interest between the Power Company and the petitioner. The petitioner was not a party to the waiver, nor did it consent thereto. The petitioner enjoyed certain water rights adverse to the Power Company. A consent by the lessor to waive compensation for the taking of the fee cannot deprive the lessee of the right to compensation, if he is otherwise entitled to it.

POINT V.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring proprietary rights under the laws of the State of New York to the Federal Government.

The Treaty of 1910 (36 Stat. part 2, p. 312) imposed a limitation upon the aggregate amount of water which the nationals of each country might draw from the Niagara River. On the American side the diversion was limited to a daily diversion at the rate of 20,000 c.f.p.s. The amount of water which the Power Company and other American users were diverting in 1917 and 1918 was well within this limitation. Article VII of the Treaty of 1910 provided (36 Stat. part 2, p. 316):

> "The foregoing provisions shall not apply to or disturb any existing use of boundary waters on either side of the boundary".

By virtue of the Treaty of 1910, the Court of Claims asserts that the United States has "assumed control" over the waters of the Niagara River for power purposes, and as a result held that the Government may take without compensation, for purposes of its own, any and all water rights owned by citizens of the State of New York, whether vested or otherwise. This is tantamount to holding that under its treaty-making powers the Federal Government may exert a proprietary right in the waters of a boundary stream, an astonishing and novel doctrine.

It may be that under the treaty-making power, or in fact under its power over navigation, the Federal Government may impose a limit on diversion, beyond which the private owner cannot go. But this falls far short of the principle announced by the Court of Claims. To limit the use of private property in the interests of navigation is one thing. It

is quite another thing to deprive a private user of his rights to use within the limits fixed, or to construe such a limitation as a transfer to the Federal Government of vested property rights recognized by local law. As this Court said in *United States* v. *River Rouge Co.*, 269 U. S. 411, 419:

> "The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation'. *Port of Seattle* v. *Oregon Railroad*, 255 U. S. 56, 63. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States* v. *Chandler-Dunbar Co.*, *supra*, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

In addition to the Treaty of 1910, the Court of Claims gave controlling weight to the Federal Water Power Act (U. S. C., t. 16, §§ 791-823). It is hard to see what bearing this Act has upon the instant case. It was passed some two years after the taking in question. There seems to be no possible reason for invoking its provisions. In respect of this Act the Court of Claims said (R. 68):

> "The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The Constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the Act. In view of this conclusion of Congress *as to its constitutional right to control water for power*, this Court will not undertake to say that it has not the powers therein asserted and exercised". (Italics ours.)

It is not entirely clear what the Court means by this passage. There is no pretense that navigation was involved, directly or indirectly, in the taking here in question. Every

drop of water drawn from the Niagara River through the intake canal flowed back into the Niagara River below the Falls without diminution, and between the point of taking and discharge the Niagara River, by reason of the intervening rapids and falls, is wholly unnavigable. This Court only recently, in *Henry Ford and Son Inc.* v. *Little Falls Fibre Co.*, decided January 6, 1930 (Adv. Op. No. 47, Oct. Term, 1929), had before it the Federal Water Power Act. In the course of its opinion, it was carefully pointed out that the legislation does not purport to authorize the impairment of private property rights recognized by state law without compensation. After quoting the provisions of Section 27 and other sections of the Act, the Court said:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration".

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power and that to such an end a writ of certiorari should be granted.

Respectfully submitted.

JOHN W. DAVIS,
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Attorneys for the Petitioner.

APPENDIX.

The pertinent provisions of New York Statutes with respect to the water rights of the Niagara Falls Power Company are as follows:

Chapter 109 of the Laws of 1889, Sec. 2, provided:

> "Said corporation [predecessor of the Niagara Power Company] shall also have power to hold, lease and convey lands or other property for the purposes of its business, and either upon such lands or elsewhere to accumulate, conduct, store, sell, lease, furnish, operate and supply the waters of the Niagara river, * * * or the power to be developed from the flow of such water for fire, sanitary, municipal, domestic, manufacturing, agricultural, electrical or power purposes * * *."

Chapter 513 of the Laws of 1892, Sec. 2, provided:

> "Said corporation [predecessor of Niagara Falls Power Company], its successors and assigns, shall have the right to take and use the waters of the Niagara river at the points heretofore authorized, and at any points on or opposite to any riparian land now owned by said corporation, * * * this right being granted upon the express condition that its acceptance shall bind said corporation to furnish free of charge electricity for light and also for power, * * * and also water for use of the state in the state reservation at Niagara and the public buildings thereon * * * provided that nothing contained herein or in any of the former acts concerning said corporation shall be so construed as to confer an exclusive right nor any right to infringe upon the state reservation, or to obstruct the navigation of the Niagara River, or to take therefrom more water than shall be sufficient to produce two hundred thousand effective horsepower."

Chapter 477 of the Laws of 1893, Sec. 2, provided:

> "The Niagara Falls Power Company, its successors and assigns, is hereby authorized and empowered * * *

to conduct, convey and furnish the waters of the Niagara river, but not in excess of the amount heretofore expressly authorized by law, or any power, heat or light developed therefrom, to, in and through any civil division of this State and to sell, furnish and deliver the same to any and all bodies or persons, public or private, wherever situate."

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IN THE

Supreme Court of the United States,

OCTOBER TERM 1930.

No. 37.

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF ON BEHALF OF PETITIONER.

JOHN W. DAVIS,
WILLIAM C. CANNON,
MONTGOMERY B. ANGELL,
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Attorneys for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF ON BEHALF OF PETITIONER.

Opinion Below.

The opinion of the Court of Claims is reported in 68 Ct. Cl. 414, and appears at R. 65-74.

Jurisdiction.

The Court of Claims announced its special findings of fact, dismissed the petition and entered judgment against the petitioner for the cost of printing the record on November 4, 1929 (R. 74). The petition for certiorari was filed January 23, 1930, and was granted on April 14, 1930. 281 U. S. 710.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 299, 43 Stat. 938 (U. S. Code, Title 28, S. 288).

Statement of Facts.

This is an action brought by the petitioner, a New York corporation, to recover just compensation for a taking by the United States for a public purpose of its property (certain water rights and water power) at Niagara Falls, New York. The facts are fully set forth in the findings of the Court of Claims at R. 47-65. That Court denied compensation as a matter of law upon the facts as found.

The petitioner is a manufacturer of wood-pulp, paper and paper products. One of its mills is located at Niagara Falls, New York, near the Niagara River, about a mile above the Falls (Finding I, R. 47). At the time this cause of action arose (1917-1918) the machinery used in the manufacturing operations at the Niagara Falls mill was operated by and adaptable only for the use of water power applied directly. The petitioner had in use at that time six waterwheels located in a wheel pit on its property some 175 feet below the surface of the ground. The water turning these waterwheels was drawn from the main power canal of the Niagara Falls Power Company at a point some 300 feet from where the power canal tapped the Niagara River. The sketch (R. 14-A) attached to the amended petition in the Court of Claims as Exhibit A shows the physical situation. The petitioner's right to draw off and use its water arose under a series of deeds and leases from the Niagara Falls Power Company dating back to 1896, which were duly recorded and were sufficient to pass an estate in realty under the law of New York (Finding II, R. 47, and Finding VIII, R. 53).

In the Fall of 1917 the Niagara Falls Power Company was diverting some 10,000 cubic feet per second of water from the Niagara River (Finding VII, R. 51-52). Of this amount 720 cubic feet per second went to the petitioner's mill under the deeds and leases above mentioned, and was directly applied to the machinery by the petitioner at that mill. The balance was used by the Niagara Falls Power Company to generate power in its own plant (Finding VIII, R. 54).

The Niagara Falls Power Company's right to divert and use water from the Niagara River arose from three sources:

(a) Private grants in fee of lands bordering on the Niagara River adjacent to and including the point of intake;

(b) Letters Patent from the State of New York granting to the Power Company certain lands under water and between high and low water mark in the bed of the Niagara River at and beyond the point of actual diversion of the waters;

(c) Special Acts of the Legislature of the State of New York specifically granting to the Power Company the right to take, use, store, sell and lease water from the Niagara River (Finding IV, R. 49).

Among its specified charter powers, the Power Company had the right to convey lands and to sell, lease and supply water from the Niagara River, or power to be developed therefrom, for manufacturing, electrical, or power purposes (Finding III, R. 48).

In the Fall of 1917 the Secretary of War undertook to investigate the power situation at Niagara Falls. This investigation was due largely to the attitude of the Canadian authorities in threatening to stop the exportation of power from the Canadian side (Finding IX, R. 55). During the course of this investigation the Secretary of War became fully advised of the operations of the petitioner's Niagara Falls mill and its water rights under its deeds and leases from the Power Company. Copies of these deeds and leases were requested by, and furnished to, the Secretary of War (Finding X, R. 55-58). On December 28, 1917, the Secretary of War, acting in the name of the President, "by reason of the exigencies of the national security and defense", issued a requisition order addressed to the Niagara Falls Power Company requisitioning "the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through

your intake canal." It was expressly stated that fair and just compensation would be paid (Finding XI, R. 58).

This requisition order of necessity operated as a taking of the water belonging to the petitioner under its deeds and leases from the Power Company, and was intended so to operate. The petitioner's property did not touch the Niagara River at any point, and the intake canal of the Power Company was the only source from which the petitioner could obtain water for its Niagara Falls mill (Finding VIII, R. 54). Without question it was the express intention of the Government, in making the requisition order, to appropriate the petitioner's water, for on the day after the requisition order was made, the Secretary of War wrote the Power Company a letter which contained the following paragraph (Finding XII, R. 61):

> "Please note that the requisition order *covers also all of the water capable of being diverted* through your intake canal to such extent as it can be used on your machinery. *This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity.* Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off." (Italics ours.)

The notification to the Paper Company referred to in the above letter had in fact been given some two weeks earlier, on December 12, 1917 (Finding XIII, R. 62).

Along with the requisition order of December 28, 1917, but separate and distinct therefrom, the Government delivered to the Power Company a document styled a "temporary waiver" with an accompanying schedule, to which the Power Company agreed (Finding XI, R. 58-61). This waiver, after reciting the requisition, stated that the Power Company had requested to be permitted to continue to produce and sell power, and that the Secretary of War believed that the exigencies of the national security and defense would be adequately provided for if the electrical power

requisitioned by the Government should be sold by and for the account of the Power Company and distributed to the industries specified by the United States in the attached schedule. The United States then agreed that it would waive delivery of any and all power on the conditions stated, and the Power Company agreed in return that it would waive any right to compensation. The petitioner was not among the industries listed in the schedule to which electrical power was to be delivered, and was not a party to this agreement (Finding XI, R. 58-61).

At the time the requisition order was made, the petitioner owned at the Niagara Falls mill large stocks of unfinished paper and wood pulp, which had to be run out if needless waste was to be prevented. The Secretary of War accordingly permitted the petitioner to continue to use its water until this stock was run out. This was accomplished on February 7th, 1918. On that date the petitioner's water was shut off under the requisition order of December 28th, and as a result the petitioner was forced to shut down its mill (Finding XIII, R. 62). At that time, as pointed out in Finding VIII, R. 54, the petitioner's machinery could be operated only by water power derived from the sources which the Government had appropriated; and no other form of power (whether steam or electric) was available. The usefulness of the Niagara Falls mill as a going concern was dependent wholly upon its supply of water.

The shut-down of the mill lasted from February 7th, 1918 until November 30th, 1918, when the requisition order was abrogated (Finding XIII, R. 62). During all this time the requisition order of December 28th remained in effect unmodified; and the petitioner was unable to obtain any water. The schedule accompanying the so-called "waiver" at no time permitted the Power Company to deliver any water to the petitioner; and throughout the period the Power Company took and used all the water diverted from the Niagara River for the purposes dictated by the Government.

The Court of Claims specifically found that the petitioner had sustained an actual out-of-pocket or direct expense of $304,685.26, which would not have been sustained if the mill had been able to operate during the period of shut-down (Finding XXII, R. 64). No compensation has ever been paid to the petitioner by the United States or by anyone else (Finding XIV, R. 63).

In addition to the foregoing, the Court of Claims in its opinion lays emphasis on certain additional facts, which for that reason should here be mentioned, although it is difficult to see their relevance. In May, 1910, the United States and Great Britain entered into a Treaty (36 Stat., Part 2, p. 312), which limited the diversion of water from the Niagara River for power purposes on the American side to a daily diversion at the rate of 20,000 cubic feet per second (Finding VI, R. 51). The amount of water which the Power Company and other American users were diverting in 1917 and 1918 was well within this limitation. Under the so-called Burton Act (Act of June 29, 1906, c. 3621, 34 Stat. 626) and a series of joint resolutions extending its operation, the Secretary of War from time to time issued to the Power Company, a series of so-called permits or licenses covering the diversion of water from the Niagara River (Finding VII, R. 51-53). The license of January 19, 1917, extended by letter of July 2, 1917, gave the Power Company permission to divert a daily total of 10,000 cubic feet per second. This license expired by its terms on July 1, 1918; and on that date it was renewed by a similar license running until June 30, 1919, permitting diversion at the same rate. These licenses stated that they were revocable at will, but the Court of Claims expressly found that at no time was any of them ever modified or revoked (Finding VII, R. 53).

In its opinion the Court of Claims several times (*e. g.*, R. 68, 71, 73) mentions and gives controlling weight to the Federal Water Power Act of 1920 (Act of June 10, 1920, Ch. 285, 41 Stat. 1063, U. S. Code, Title 16, Secs. 791-823). This statute, it will be noted, was enacted some two years after the expropriation which gave rise to the present suit.

Specifications of Error.

The ultimate error assigned is that the Court of Claims erred in holding as a matter of law that the petitioner was not entitled to compensation for the taking of its property. The detailed specifications of error (all of which are intended to be urged here) are set forth in the petition for certiorari under the heading "Questions Presented" (R. 3).

Summary of Argument.

I. THE PETITIONER'S RIGHT TO THE USE OF ITS WATER WAS NOT A MERE CONTRACTUAL RIGHT *IN PERSONAM*, BUT AMOUNTED UNDER THE LAWS OF NEW YORK TO A PRESENT ESTATE IN THE NATURE OF A LEASEHOLD OF REALTY.

II. THE TAKING OF PETITIONER'S WATER RIGHTS WAS AN INTENTIONAL TAKING OF PRIVATE PROPERTY FOR A PUBLIC PURPOSE, FOR WHICH COMPENSATION MUST BE PAID UNDER THE FIFTH AMENDMENT. *DUCKETT & COMPANY* v. *UNITED STATES*, 266 U. S. 149.

III. THE POWER COMPANY'S WAIVER OF COMPENSATION CANNOT OPERATE TO DEPRIVE THE PETITIONER OF ITS RIGHT TO COMPENSATION IN RESPECT OF ITS OWN PROPERTY.

IV. THE TAKING WAS NOT ACCOMPANIED BY ANY REVOCATION OF THE FEDERAL LICENSE AND WAS NOT UNDER ANY CLAIM OF RIGHT.

V. NEITHER THE TREATY WITH GREAT BRITAIN NOR THE FEDERAL WATER POWER ACT HAS THE EFFECT OF TRANSFERRING TO THE FEDERAL GOVERNMENT PROPRIETARY RIGHTS IN THE WATERS OF THE NIAGARA RIVER ACQUIRED UNDER THE LAWS OF THE STATE OF NEW YORK.

VI. UPON THE FACTS AS FOUND, PETITIONER IS ENTITLED TO COMPENSATION IN THE AMOUNT OF $304,684.26, WITH INTEREST AT 6% FROM THE DATE OF THE TAKING.

ARGUMENT.

POINT I.

The petitioner's right to the use of its water was not a mere contractual right *in personam*, but amounted to a present estate in the nature of a leasehold of realty.

The character of petitioner's rights in the use of its water is determined by the laws of the State of New York, where the property in question is located.

> *Fox River Company* v. *Railroad Commission*, 274 U. S. 651, 655;
> *Port of Seattle* v. *Oregon & Washington Railroad*, 255 U. S. 56, 63;
> *United States* v. *Cress*, 243 U. S. 316, 319;
> *St. Anthony Falls Power Company* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358;
> *Shively* v. *Bowlby*, 152 U. S. 1;
> *Kaukauna Company* v. *Green Bay Canal Company*, 142 U. S. 254, 272;
> *Hardin* v. *Jordan*, 140 U. S. 371, 382;
> *St. Louis* v. *Rutz*, 138 U. S. 226, 242.
> *Packer* v. *Bird*, 137 U. S. 661;
> *Barney* v. *Keokuk*, 94 U. S. 324;

In the *Fox River Company* case, Mr. Justice Stone said (274 U. S., at p. 655):

> "* * * the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state."

In the present case, it is unnecessary to decide whether the mere fact of ownership of the uplands would or would not

have operated to give the Power Company title to the bed of the Niagara River, or the right to divert water. The Power Company's title to the bed of the river, and its right to divert water, were not dependent merely upon its ownership of the uplands or upon grants from private individuals. On the contrary, as is pointed out in Finding IV, R. 49, the Power Company held title to the bed of the stream under Letters Patent from the State of New York, and had been given specific authority by New York statute to take, use, store, sell and lease water from the Niagara River. Under the New York decisions, the water rights of the Power Company (whether derived from its ownership of the uplands or from specific grants by the State, or both) were vested property rights so far identified with realty as to constitute a corporeal hereditament.

United Paper Board Company v. *Iroquois Paper and Pulp Company,* 226 N. Y. 38;
Matter of Van Etten v. *City of New York,* 226 N. Y. 483, 486;
Waterford, etc., Company v. *State,* 208 App. Div. 273, affirmed without opinion 239 N. Y. 629;
Tracy Development Co. v. *Becker,* 212 N. Y. 488, 499;
Lawrence v. *Whitney,* 115 N. Y. 410;
Gould, *Treatise on Waters,* 3rd Ed. Ch. VI, p. 394.

In the *Van Etten* case, *supra,* the court said (226 N. Y. at p. 486):

> "The right of the owner of riparian land to the natural flow of water in a stream along the land is a corporeal hereditament and is an incident to and is annexed to the land as part and parcel of it. It is not, and is more than, an easement. The right is usufructuary. It is properly classified at common law, equally with the land itself, as real property."

Being hereditaments, water rights fall within the definitions contained in Section 2 of the New York Real Property

Law* (Laws of 1909, Ch. 52) and in Section 40 of the New York General Construction Law** (Laws of 1909, Ch. 27), and are properly classified, under those laws, as real property. *Tracy Development Company* v. *Becker*, 212 N. Y. 488, 499.

As already noted, by special grants of the New York Legislature, the Power Company in this case was given the express right to take, use, store, sell and lease water from the Niagara River. Ch. 109 of the Laws of 1889 (quoted *infra*, Appendix, p. 30); Ch. 513 of the Laws of 1892 (quoted *infra*, Appendix, p. 30); Ch. 477 of the Laws of 1893 (quoted *infra*, Appendix, p. 30). In view of both the common law of New York and these express legislative grants of the right to withdraw water, coupled with the legislative grant of title to the bed of the Niagara River, the Power Company's right to the use of the water was unquestionably an interest or estate in realty; and this has been the express holding in a similar case affirmed by the Court of Appeals of New York. *People ex rel. Niagara Falls Hydraulic Manufacturing Company* v. *Smith*, 175 N. Y. 469, affirming without opinion 70 App. Div. 543.

In that case it appeared that the relator owned certain property, consisting among other things of a canal and power plant, extending from a point on the Niagara River directly above the Falls to a point on the river below the Falls. This property embraced lands under the waters of the Niagara River near the mouth of the Company's canal, the canal proper (which was about 100 feet wide and a mile long), the canal basin near the edge of the high bank of the Niagara River below the Falls, land below the high bank of the Niagara River, and other property. In 1883 the State of New York acquired all lands between relator's canal and the brink of the Falls for a State park. In 1896 the Leg-

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* "The terms 'real property' and 'lands' as used in the first eight articles of this chapter are coextensive in meaning with lands, tenements and hereditaments." N. Y. Real Property Law, § 2.

** "The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal." N. Y. Gen. Const. Law, § 40.

islature passed a special act confirming and defining the riparian rights of the relator (N. Y. Laws of 1896, ch. 968). This act was substantially similar in wording and effect to the various special acts of the New York Legislature defining the powers and the riparian rights of the Power Company in the case at bar. In 1901 the State of New York, for tax purposes, undertook to assess as part of the relator's real property its right to take water from the Niagara River. The relator asserted that this right was a franchise and as such was not assessable as real property. The court held, however, that the relator's right to draw water from the river was not a franchise but a corporeal hereditament appurtenant to its land, and decreed that the value of that interest was properly included as realty in assessing the land for purposes of taxation.

We turn now to the nature of the petitioner's rights, as distinguished from the rights of the Power Company. The right of the petitioner to take and use water from the Power Company's intake canal originated in the deed of March 7, 1896 (Exhibit B to amended petition, R. 15; cf. Finding VIII, R. 53). By this deed, the Power Company conveyed to the Niagara Falls Paper Company (predecessor in title of the petitioner), and to its successors and assigns forever, certain described land and land under water in the City of Niagara Falls, which in 1918 constituted the site of the Niagara Falls Mill,

> "together with three thousand horse power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging" (R. 16).

The grant of both the land and the water power was in perpetuity, subject, however, to certain reservations contained in the deed, including payment to the Power Company, its successors and assigns, of $24,000 per year

> "as an annual rental for the right to take, develop and use upon the premises hereby granted, water and water power sufficient to produce Three thousand (3,000) Horse Power as hereinafter defined" (R. 17).

The Power Company, for itself, its successors and assigns, gave the usual covenants that it was the lawful owner of the property in question and had a good right to convey, and

> "that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and that the party of the second part [the Paper Company], on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever" (R. 18).

This deed fulfilled all the required formalities for a deed conveying realty under the laws of New York, and was duly recorded in the County Clerk's office of Niagara County.

On the same day as the execution of this deed (March 7, 1896) the Power Company entered into a lease with the Niagara Falls Paper Company (Exhibit C to amended petition, R. 29; cf. Finding VIII, R. 53), in which the execution of the deed was recited, and it was stated that the Paper Company desired to obtain additional power beside that to be developed under the terms of the deed,

> "and to pay for such right by way of rental for a term of years, and not as a condition of said conveyance" (R. 30).

The lease then gave to the Paper Company, its successors and assigns, for a term of years the right to take additional water from the Power Company's canal, for use at the Niagara Falls mill, in an amount sufficient to develop 2,900 horsepower, in addition to the 3,000 horsepower granted in perpetuity by the deed. This lease ran for a period of ten years from 1896, with the right in the Paper Company to renew for one or more additional terms of ten years until January 1, 1936. In addition, the Paper Company was given the right on ten days' written notice to take, use and discharge additional water sufficient to develop blocks of not less than 500 horsepower up to the full capacity of the discharge tunnel leading from the bottom of the Paper Company's wheelpit to the main tunnel of the

Power Company. The Paper Company agreed to pay $29,000 a year as an annual rental for the 2,900 horsepower, and a further rental at the rate of $10 per horsepower per annum for each additional block of 500 horsepower which it might elect to take. This lease fulfilled all the requirements for a lease of realty in New York and was duly recorded in the County Clerk's Office of Niagara County.*

The International Paper Company, petitioner in this case, by deed dated January 1, 1898 (Exhibit D to amended petition, R. 37, cf. Finding VIII, R. 53) acquired all the title of the Niagara Falls Paper Company to its land and water rights at the Niagara Falls mill, including its right to take water from the Power Company's intake canal under the deed and lease of March 7, 1896. By agreement dated June 1, 1898 (Exhibit E to amended petition, R. 43; cf. Finding VIII, R. 54) between the Power Company and the petitioner, the Power Company recognized and consented to the transfer to the petitioner of the land and water rights formerly owned by the Niagara Falls Paper Company and confirmed the grants, rights and agreements transferred to the petitioner, and agreed with the petitioner to fulfill and carry out the deed and lease as if they had been originally made between the petitioner and the Power Company. The petitioner in turn assumed all the obligations contained in the deed and lease.

The Paper Company from time to time duly exercised the option contained in the lease, and took and used additional blocks of water. In January 1918, it was taking and using from the Power Company's canal an amount of water sufficient to develop 8,156.25 horsepower, which was equivalent to 720 cubic feet per second (Finding VIII, R. 54). This represented a substantial part of the total of 10,000 cubic feet per second which the Power Company was then taking from the Niagara River.

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* The recording statute of New York (Real Property Law, Sections 290 and 291) provides that a lease of real property for a term exceeding three years may be recorded in the same manner, and with the same effect, as a conveyance of the fee.

Under these various conveyances, the right of the petitioner to the water from the Power Company's canal was not a mere contractual right *in personam* against the Power Company, but was an estate in realty.

It is unquestionable that the right of the Power Company to divert and use the water of the Niagara River was real property under the laws of New York, as shown by the cases already cited. It is equally unquestionable that the Power Company had a right to convey or lease a part of its water rights to another party, whether or not the grantee was a riparian owner, for the Court of Appeals of New York has expressly declared that the right to use the water of a flowing stream is

> "* * * a valuable property right which can be severed from the riparian land by grant, condemnation, relinquishment or prescription." *United Paper Board Company* v. *Iroquois Paper and Pulp Company*, 226 N. Y. 38, 46.

Under the law of New York, the purchaser or lessee in such a case becomes the owner of an estate in realty.

> *United Paper Board Company* v. *Iroquois Paper and Pulp Company, supra;*
>
> *Tracy Development Company* v. *Becker*, 212 N. Y. 488, 499;
>
> *Morehouse* v. *Woodruff*, 218 N. Y. 494, 501;
>
> *Saratoga State Waters Corporation* v. *Pratt*, 227 N. Y. 429, 444;
>
> *Onondaga Water Service Corporation* v. *Crown Mills*, 132 Misc. 848, 853; 230 N. Y. Supp. 691, 697;
>
> *Barnes* v. *Martin*, 143 N. Y. Supp. 792, 796, affd. 164 App. Div. 912, affd. 220 N. Y. 713;
>
> *Matter of Hall*, 116 App. Div. 729, affd. 189 N. Y. 552;
>
> Gould, *Treatise on Waters*, 3rd Ed. ch. X, p. 581.

In *Tracy Development Company* v. *Becker, supra,* the Court of Appeals said (212 N. Y. at p. 499):

> "* * * Water is not land. It is an incident to land which gives to the owner of the land certain rights and privileges in the use of the water. If it flows over his own land it is so far identified with the realty as to be a corporeal hereditament; and if the right is to use it as it flows over the lands of another it is an incorporeal hereditament. In either event the right of property in the water is usufructuary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected. Since such an hereditament is incident to land, it naturally passes with land, and, therefore, it is properly classified as real property in the 'Real Property Law,' in the 'Statutory Construction Law' and in the 'Tax Law.'"

Moreover, in the present case it must be remembered that the Power Company, by express legislative grant, possessed not merely the right to take and use the waters of the Niagara River for its own benefit, but also the right to "sell and lease" them to other parties. Having an estate in realty in the use of the flowing water, the Power Company carved out and conveyed to the petitioner a smaller estate, which was none the less an estate in realty and not a mere contractual right. The petitioner, as lessee of the water rights involved, enjoyed something more than a mere contractual right *in personam* against the Power Company. At the time of the Government's requisition it possessed and enjoyed a vested property right in the flowage of the water through its mill.

POINT II.

The taking of petitioner's water rights was an intentional taking of private property for a public purpose, for which compensation must be paid under the Fifth Amendment.

The water rights of the petitioner were undoubtedly taken, and intentionally taken for a public purpose, during the ten months' period in which the Government's requisition order of December 28, 1917 (R. 58) remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment, for which, if taken, compensation must be paid.

> *Pumpelly* v. *Green Bay Company*, 13 Wall. 166;
> *United States* v. *Lynah*, 188 U. S. 445;
> *United States* v. *Welch*, 217 U. S. 333;
> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312;
> *United States* v. *Alexander*, 148 U. S. 186;
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645;
> *James* v. *Campbell*, 104 U. S. 356;
> *Central Trust Co.* v. *Hennen*, 90 Fed. 593;
> *Williams* v. *United States*, 104 Fed. 50;
> *Lowndes* v. *United States*, 105 Fed. 838.

By the requisition order of December 28th, 1917, the President, "by reason of the exigencies of the national security and defense", took over and requisitioned

> "The total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal."

While this order was on its face addressed to the Power Company and not to the petitioner, it of necessity amounted

to a taking of the petitioner's water, as well as that of the Power Company. The *res* which was taken was "the use of all waters diverted or capable of being diverted" through the Power Company's intake canal. All of the petitioner's water came from this source. The Court of Claims found (Finding VIII, R. 54) that there was no other source from which the petitioner could obtain water to run its mill. This water it was then taking by virtue of its deeds and leases from the Power Company.

It is true that the requisition in terms was not for the water as such, but for "the total quantity and output of the electrical power" capable of being produced by the use of the water. But the electrical power could be produced only by the use of the water; one was the alter ego of the other. In fact the electrical energy generated by the dynamos was merely another manifestation of the power inherent in the flowing water. They constituted one and the same thing. Recognizing this, the requisition order described the power which was taken as all power which could be produced "through the use of all waters diverted or capable of being diverted" through the canal; and the Secretary of War's letter (R. 61), which followed the service of the requisition order by only twenty-four hours, specifically stated that "the requisition order covers also all of the *water*" capable of being so diverted. Clearly the essence of the taking was a taking of the water, including that portion which had been leased by the Power Company to the petitioner.

Moreover, there is no doubt that the Government itself intended that the requisition order should operate as an expropriation of the petitioner's water. Before the requisition order was made, the Secretary of War (acting through his representative, Mr. Bulkley) had specifically inquired as to the extent of the petitioner's rights in the water, and had been furnished with copies of the deeds and leases forming the muniments of petitioner's title (Finding X, R. 55-58). The day after the requisition order, the Secretary of War wrote to the Power Company specifically stating that the order

"is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity."

This case, we submit, is governed by the decision of this Court in *Duckett & Company* v. *United States*, 266 U. S. 149. There the Secretary of War, by formal requisition (addressed "To Whom it May Concern") took over the Bush Terminal in Brooklyn. The plaintiff was the lessee of one of the piers included in the Terminal. This Court, reversing the Court of Claims, awarded compensation to the plaintiff for the taking of his leasehold, saying at page 150:

"On the face of those acts it seems to us manifest that the United States, although not taking the fee, proceeded *in rem* as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world. Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 184. *Farnsworth* v. *Boston*, 126 Mass. 1, 8. In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use. *United States* v. *Welch*, 217 U. S. 333, 339. See *Peabody* v. *United States*, 231 U. S. 530, 538. Here the taking purported to be a taking of the Bush Terminal docks, &c.—not of the title of the Bush Terminal Company, but of the things, to whomsoever they belonged. The notice was 'to whom it may concern.' The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant."

So in this case, the taking was a taking of all the water capable of being diverted through the Power Company's canal. The petitioner, lessee of part of this water, "was turned out like the others".

In the instant case, however, the Court of Claims refused to apply the *Duckett* case, and held instead that the case was governed by *Omnia Commercial Company* v. *United States*, 261 U. S. 502. In this, we submit, the Court of Claims was in error.

In the *Omnia Commercial Company* case, the plaintiff had made an executory contract with the Allegheny Steel Company for the delivery of steel. Before any deliveries had been made, the United States requisitioned the Allegheny Steel Company's entire production, thus preventing delivery to the plaintiff. This Court held that the plaintiff was without recourse against the United States, since it had merely a contractual right against the Steel Company and its contract had not been taken, but had merely been frustrated.

In the case at bar, as pointed out above, the petitioner's right to the water was not a mere contractual right similar to that possessed by the Omnia Commercial Company. It was a right *in rem*, amounting under the laws of New York to an estate in realty, precisely like the leasehold interest of Duckett & Company. If the petitioner's right had been in the nature merely of a personal executory contract calling for the delivery of electrical power, there might have been some ground for applying the *Omnia* case. But the petitioner had more than a personal executory contract. Under its deeds and leases, it had a vested estate in realty in its right to the use of its water. Upon a part of that water, it held a perpetual leasehold, and upon the balance it held a lease for a term of years, subject in each case to the payment of an annual rent. The grant in each case was not personal to the original grantee, but ran in favor of the grantee, its successors and assigns; and the right to use the water, under the terms of the deed of 1896, was appurtenant to the premises granted by that deed. At the time of the taking, the peti-

tioner was in full possession and enjoyment of its estate. As in the *Duckett* case, "the claimant's possession under its lease was a part of the *res*, and therefore was within the implied promise to pay". The Government's requisition order, during the time it was in effect, took both the leasehold and the fee of the water to the same extent and effect as the requisition order in the *Duckett* case. Under the ruling in the *Duckett* case the petitioner is entitled to compensation for what was taken.

In a recent case in the Court of Appeals of the District of Columbia the Court fully recognized this principle when it said, speaking of the right to just compensation under the Fifth Amendment:

> "The interest of the lessee is as much entitled to protection as that of the lessor." *Wrenn* v. *Smith*, 41 F. (2nd) 972, 973.

POINT III.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its right to compensation in respect of its own property.

The fact that the requisition order of December 28, 1917, was addressed to the Power Company and not to the petitioner cannot of course affect the ultimate result. At the time this requisition order was made and served, the United States knew that the Power Company did not itself own or have the right to use all the water which it was diverting. It was fully advised as to the rights of the Paper Company, and in writing expressed its intention to take those rights. The order was an unconditional requisition. It was a command and not an offer; and neither the Power Company nor the petitioner had any option save to obey. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220.

The so-called "waiver" (R. 58-61) accompanying the requisition was a separate and distinct document. By this the Power Company (not the Paper Company) waived the compensation to which the requisition entitled it, on condition that it be allowed to continue to supply electrical power to certain designated industries, and collect its schedule rates. Through this device the Power Company obtained the equivalent of compensation for the taking.

But there was no identity of interest between the Power Company and the petitioner. The petitioner was not a party to the waiver, did not consent to it, and was not upon the list of companies named in the schedule, to which the Power Company was permitted by the Government to deliver power. The petitioner's rights in the water were enjoyed adversely to the Power Company. The Power Company was not entitled to speak or act for the petitioner, and was certainly not authorized to waive petitioner's rights. A consent by the lessor to waive compensation for the taking of the fee cannot operate to deprive the lessee of the right to compensation for the taking of the leasehold. As was said in the *Duckett* case (266 U. S. at p. 151):

> "Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

Under these circumstances it is a little difficult to understand what the Court of Claims meant when it said (R. 72):

> "The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned."

At no time did the petitioner waive its rights or consent to any taking, whether of its property or of that of the Power Company. Petitioner's water power was taken by the Gov-

ernment "by reason of the exigencies of the national security and defense". The Power Company's waiver recited that "in the judgment of the Secretary of War such exigencies will be provided for adequately for the time being" by supplying electricity to be developed from the seized water power to certain industries named in the schedule. These industries were regarded as essential war industries, while the petitioner's business was not. (Findings VIII and IX, R. 54-55; cf. R. 69, 73-4.) The requisition order was in the name of the President; and the taking was for a public use, in aid of the prosecution of the war. The waiver of just compensation by the Power Company on the conditions specified did not change the nature of the requisition order of December 28, 1917. Certainly it did not change the nature of that order so far as the petitioner was concerned. Nor did it affect the obligation of the United States to pay just compensation for the taking. The requisition order stood, with all its legal consequences. By agreement with the Government, the Power Company waived its own undoubted claim for just compensation (a claim expressly recognized in the requisition order) and acquired in lieu thereof the right to continue to produce and sell power to such industries and in such amounts as the United States directed in the schedule accompanying the waiver. In this way the United States parceled out the power which it had taken by sovereign right among certain industries which it deemed essential for the successful prosecution of the war. Upon the taking of the water, the United States controlled the use and directed it for war purposes. But the petitioner was not a party to the waiver and received no compensation for the taking of *its* property, notwithstanding that the Court of Claims expressly found that the petitioner *"was entitled"* to its water under the deeds and leases already mentioned, and *"was deprived"* of that water *"by the United States"*. (Finding XIV, R. 63). Under these circumstances, a promise to pay the petitioner will be implied in law; and any waiver which the Government may have obtained from the Power Company cannot prejudice the petitioner's rights.

POINT IV.

The taking was not accompanied by any revocation of the Federal license and was not under any claim of right.

The Court of Claims specifically found that the Federal licenses authorizing the Power Company to divert water from the Niagara River remained in effect during the period of the taking and were never revoked (Finding VII, R. 53). In fact, one of those licenses terminated on July 1, 1918, precisely in the middle of the period during which the requisition order remained operative, and a new license was immediately issued the same day, running until July 30, 1919 (Finding VII, R. 52). The requisition order makes no reference to the licenses, but on the contrary in terms undertakes to pay "fair and just compensation". This express promise certainly negatives any argument that the taking was under any claim of right.

Nevertheless, in the Government's brief in opposition to our petition for certiorari, it is argued that the "substantial effect" of the requisition order was equivalent to a revocation of the Power Company's license. If the Government's present contention be sound, then both the petitioner and the Power Company were mere tenants at sufferance, and were liable to be evicted by the Federal authorities without compensation at a moment's notice, although they enjoyed vested property rights conferred upon them by the State of New York. If the whole proceeding amounted merely to such an eviction (as the Government now claims), why were the licenses not mentioned in the requisition order, and why did the Court of Claims expressly find that the licenses were never revoked or modified? If neither the Power Company nor the petitioner was entitled to compensation, why did the requisition order expressly undertake to pay compensa-

tion? If the making of the requisition order on December 28, 1917, amounted to a revocation of the license then in force, why did the Secretary of War renew that license as a matter of course when it expired six months later on July 1, 1918? Even if it be conceded that the rights of the Power Company or the petitioner were in any way dependent upon the existence of a Federal license, which we respectfully deny, the record is clear that in taking the property the Government did not proceed as by revocation of the license. This is certainly true with regard to the Power Company, both by reason of the fact that the licenses continued in effect throughout the period of the taking, and were in fact renewed during that period, and also by reason of the fact that the requisition order promised to pay compensation. This promise, when made with knowledge of the lessee's rights, and with the intention of depriving the lessee of those rights (as was the fact here), implies a promise to pay compensation to the lessee also.

POINT V.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring to the Federal Government proprietary rights in the waters of the Niagara River acquired under the laws of the State of New York.

The United States has no proprietary rights in the bed of the Niagara River or in its waters. Title both to the bed and to those waters is in the State of New York, or in private individuals deriving their title from the laws of New York, subject only to the paramount right of the United States to control the bed and the waters for purposes of navigation.

Appleby v. *City of New York*, 271 U. S. 364;
Massachusetts v. *New York*, 271 U. S. 65, 89;
International Bridge Co. v. *New York*, 254 U. S. 126;
Goodtitle v. *Kibbe*, 9 How. 471;
Pollard's Lessee v. *Hagan*, 3 How. 212;
Martin v. *Waddell*, 16 Peters 367.

In the case at bar no question of navigation or navigability is involved. Between the point of intake of the water above the Falls and its discharge below the Falls, the Niagara River is wholly unnavigable on account of the intervening rapids and falls, and the temporary use of the water for power purposes did not diminish the flow in the river below, for all the water taken was returned through the tail-race tunnel. Thus there is no opportunity for invoking the doctrine of paramount control over navigation, and we do not understand that the Government attempts to invoke that doctrine.

The Treaty of 1910 with Great Britain (36 Stat. part 2, p. 312) imposed a limitation upon the aggregate amount of water which the nationals of each country might draw from the Niagara River. On the American side the withdrawal was limited to a daily diversion at the rate of 20,000 cubic feet per second. The amount of water which the Power Company and other American users were diverting in 1917 and 1918 was well within this limitation. Both the Power Company and the Paper Company had been taking and using water from the Niagara River long before the adoption of the treaty. Article VIII of the Treaty of 1910 provided (36 Stat. part 2, p. 316):

> "The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary."

By virtue of the Treaty of 1910, the Court of Claims asserted that the United States has "assumed control" over the waters of the Niagara River for power purposes, and as a result held that the Government may take without compensation, for any purposes which it deems fit, any and all water

rights owned by citizens of the State of New York, whether vested or otherwise. This is tantamount to holding that under its treaty-making powers the Federal Government may acquire and exercise, without compensation to the owner, a proprietary right in the waters of a boundary stream, an astonishing and novel doctrine.

It may be that under the treaty-making power, or in fact under its power over navigation, the Federal Government may impose a limit on diversion, beyond which the private owner cannot go. But this falls far short of the principle announced by the Court of Claims. To limit the use of private property in the interests of navigation is one thing. It is quite another thing to deprive a private owner of his rights to use within the limits fixed (navigation being in no way involved), or to construe such a limitation as a transfer to the Federal Government of vested property rights recognized by local law. As this Court said in *United States* v. *River Rouge Co.*, 269 U. S. 411, 419:

> "The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation'. *Port of Seattle* v. *Oregon Railroad*, 255 U. S. 56, 63. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States* v. *Chandler-Dunbar Co., supra*, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

Or, as was said in *United States* v. *Cress*, 243 U. S. 316, 319:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 671; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.*

> v. *St. Paul Water Commissioners*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (*Shirely* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471)."

See also *Wisconsin* v. *Illinois*, 278 U. S. 367, 415.

The Court of Claims, in addition to considering the Treaty of 1910, discussed in some detail the extent of Federal powers in relation to navigation, and in this connection gave what it termed "controlling effect" (R. 73) to the Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063; U. S. Code, Title 16, Sec. 791-823). It is hard to see what bearing this Act has upon the case. It was passed some two years after the taking in question. There seems to be no possible reason for invoking its provisions. In respect of this Act the Court of Claims said (R. 68):

> "The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The Constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the Act. In view of this conclusion of Congress *as to its constitutional right to control water for power*, this Court will not undertake to say that it has not the power therein asserted and exercised." (Italics ours.)

It is not entirely clear what the Court means by this passage. There is no pretense that navigation was involved, directly or indirectly, in the taking here in question. The taking was a taking wholly and indisputably for war pur-

poses. As the requisition order stated, it was "by reason of the exigencies of the national security and defense," and had no relation whatsoever to the navigation or navigability of the Niagara River or to the regulation of interstate or foreign commerce. This Court only recently, in *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, had before it the Federal Water Power Act. In the course of that opinion, it was carefully pointed out that the Act does not purport to authorize the impairment, without compensation, of private property rights recognized by state law. After quoting the provisions of Section 27 and other sections of the Act, the Court said (280 U. S. at p. 378):

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration."

POINT VI.

Amount of Compensation.

The Court of Claims found that by reason of the shutdown of the Niagara Falls mill, occasioned by the taking of the water supply by the Government, the petitioner sustained "an actual out-of-pocket or direct overhead expense of $304,684.26" (Finding XXII, R. 64). To this amount petitioner is entitled under the decisions of this Court to add interest at 6% (the legal rate in New York) from the date of the taking.

Phelps v. *United States*, 274 U. S. 341;
Liggett and Myers v. *United States*, 274 U. S. 215;
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299;
Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, 123.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Claims should be reversed, and the cause remanded with directions to award proper compensation to the petitioner, in accordance with the findings of the Court of Claims.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of New York Statutes with respect to the water rights of the Niagara Falls Power Company are as follows:

Chapter 109 of the Laws of 1889, Sec. 2, provided:

> "Said corporation [predecessor of Niagara Falls Power Company] shall also have power to hold, lease and convey lands or other property for the purposes of its business, and either upon such lands or elsewhere to accumulate, conduct, store, sell, lease, furnish, operate and supply the waters of the Niagara river, * * * or the power to be developed from the flow of such water for fire, sanitary, municipal, domestic, manufacturing, agricultural, electrical or power purposes * * *."

Chapter 513 of the Laws of 1892, Sec. 2, provided:

> "Said corporation [predecessor of Niagara Falls Power Company], its successors and assigns, shall have the right to take and use the waters of the Niagara river at the points heretofore authorized, and at any points on or opposite to any riparian land now owned by said corporation, * * * this right being granted upon the express condition that its acceptance shall bind said corporation to furnish free of charge electricity for light and also for power, * * * and also water for use of the state in the state reservation at Niagara and the public buildings thereon * * * provided that nothing contained herein or in any of the former acts concerning said corporation shall be so construed as to confer an exclusive right nor any right to infringe upon the state reservation, or to obstruct the navigation of the Niagara River, or to take therefrom more water than shall be sufficient to produce two hundred thousand effective horsepower."

Chapter 477 of the Laws of 1893, Sec. 2, provided:

> "The Niagara Falls Power Company, its successors and assigns, is hereby authorized and empowered * * *

to conduct, convey and furnish the waters of the Niagara river, but not in excess of the amount heretofore expressly authorized by law, or any power, heat or light developed therefrom, to, in and through any civil division of this State and to sell, furnish and deliver the same to any and all bodies or persons, public or private, wherever situate."

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM 1930.

No. 37.

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

JOHN W. DAVIS,
WILLIAM C. CANNON,
MONTGOMERY B. ANGELL,
PORTER R. CHANDLER,
Attorneys for Petitioner.

THE BALLOU PRESS NEW YORK

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Statement.

The Government's brief on the merits constitutes such a radical departure, not only from the line of argument taken by the Government in the Court of Claims and accepted by that court as the basis for its decision, but also from the line of argument adopted in the Government's brief in opposition to our petition for certiorari, as to render it necessary for us to file this reply.

In the Court of Claims, the Government sought to defeat petitioner's claim for just compensation primarily by the argument that the taking of petitioner's water power proceeded under a claim of right and was a lawful incident to the control exercised by the Government over navigable waterways. Alternatively, it was argued that the Government had not "taken" petitioner's "property" within the

meaning of the Fifth Amendment, but had merely frustrated the performance of a contract, for which no compensation was payable, under *Omnia Commercial Company* v. *United States*, 261 U. S. 502. Both lines of argument were in substance accepted by the Court of Claims and made the basis of its decision (R. 65-74). The same arguments were repeated in the Government's brief in opposition to our petition for certiorari; and our main brief was accordingly largely occupied with a discussion of the points above mentioned.*

In its brief on the merits, however, the Government now has seen fit to abandon most of the arguments upon which it has until now relied and has proceeded upon the new theory —not heretofore advanced in the case—that the taking was unauthorized by statute and was, therefore, a mere tortious act of the Secretary of War, for which no compensation can be recovered against the Government. Alternatively, it is now argued that the taking of our water power (although it amounted to a total eviction and expropriation) was not a "taking" in the constitutional sense, but was a mere "regulation",—or, as counsel say at page 14 of their brief, "was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable." The fundamental change of position made by the Government in its brief in this Court we presume must be taken as constituting a repudiation of the grounds upon which the Court of Claims below rested its decision, notably the assertion made by the Court of Claims that the Federal Government has a paramount proprietary right in the waters of international streams.

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* Supplementing the argument on the points covered in our main brief, we call the court's attention to a very recent article entitled "New York and its Waters", by Hon. William S. Andrews, formerly a Judge of the Court of Appeals of New York, appearing in the December, 1930, issue of the Cornell Law Quarterly. (Vol. XVI, No. 1, p. 1.)

POINT I.

The taking of petitioner's water rights was pursuant to statute, and was not the mere private or tortious act of the Secretary of War.

Under Point I of their brief (pp. 6-11) counsel for the Government call attention to the undisputed rule of law that unless a taking of private property is made under lawful authority it does not give rise to any valid claim against the United States. With this proposition we do not quarrel. But when counsel go on to assert that the President and the Secretary of War, when they took our water power in the name of the United States, under the requisition order of December 28, 1917, were acting without any warrant or authority of statute, and were therefore mere tortfeasors, we must emphatically disagree.

At the outset it is worth while to note again the form of the requisition order under which the petitioner was deprived of its water power. That requisition order (Finding XI, R. 58) was in the form of a letter, signed personally by the Secretary of War, reading as follows:

"Council of National Defense, Washington,

December 28, 1917.

To Niagara Falls Power Company, Niagara Falls, N. Y.

Sirs:

The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order

will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

NEWTON D. BAKER,
Secretary of War."

On the day following the delivery of this requisition order, the representative of the Secretary of War wrote to the Power Company a letter containing the following paragraph (Finding XII, R. 61):

> "Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. *This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity.* Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off." (Italics ours.)

And two days later, on December 31st, the representative of the Secretary of War telegraphed to petitioner's general counsel as follows (Finding XII, R. 62):

> "Power Company has been directed to take water hitherto used by International Paper Co."

Section 120 of the National Defense Act (Act of June 3, 1916, c. 134, s. 120, 39 Stat. 166, 213; U. S. Code, Title 50, Sec. 80) provides as follows:

> "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company,

> association, corporation, or organized manufacturing industry.
>
> Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, * * *".

In case of failure to comply, the President was authorized forthwith to take over and operate the plant.

This section in terms authorizes the President, acting through the head of the proper Department, to requisition from any individual, firm or company "such product or material" as may be required and "which is of the nature and kind usually produced or capable of being produced" by such individual, firm or company. Clearly, this authorizes the requisition of the electrical output of any company, such as the Power Company, which might be needed for war purposes. Now in the case of a company producing electrical power by means of water power, the authority to requisition the electrical power clearly carries with it by implication the authority to requisition the water necessary in producing such electrical power. Such authority, although implied, is necessarily inherent in the express statutory authorization. Moreover, in case a particular company to which a requisition order is directed should fail to comply, the President is specifically authorized forthwith to take over and operate the plant. If the Power Company, for instance, should have refused to recognize the requisition order and the President had proceeded under this authority to take over and operate, clearly the President would have been entitled to exercise the right of expropriation in respect of the Power Company's water power as well as its electrical output. The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of

the legislation. This is particularly true of a war-time authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Improvement Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255. Cf. *Maresca* v. *U. S.*, 277 Fed. 727, 735, certiorari denied 253 U. S. 498.

The wording of the requisition order in the instant case is clearly borrowed in part from the National Defense Act, and it is clear that the Secretary of War, at any rate, construed that act as giving him full authority to make the requisition, and intended to act under it.*

The Government admits as much when it says at page 9 of its brief:

> "Several statutes, such as the National Defense Act (*infra*, pp. 22-23), give the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these statutes that the Secretary of War, assumed, in behalf of the President, to requisition the output of the power plant in the instant case."

In the Court of Claims, moreover the Government admitted that the taking was pursuant to statute (although it erroneously attempted to argue that the statute in question was Section 10 of the Lever Act) and went so far as to say (Government's brief in Court of Claims, page 368):

> "It is believed that the defendant is safely within the record when it states that the issuance of the purported requisition was an act by the President, through the

---

* At the time when the order was made, there were other statutes which gave to the President wide powers to requisition private property of all kinds in aid of the prosecution of the war, under which he might conceivably have acted in the present case,—*e. g.*, the Naval Emergency Fund Act of March 4, 1917, c. 180, 39 Stat. 1192-3; and the various Appropriation Acts cited *infra*, pp. 7 and 8. The relevant portions of these Acts are set forth *infra*, in the Appendix (p. 18). The last section of the Naval Emergency Fund Act should particularly be noted. It is discussed *infra*, at page 23 of the Appendix.

> agencies adopted by the President, *under authority conferred by congressional action.*" (Italics ours.)

And in Finding XIV (R. 63) the Court of Claims specifically found that the petitioner had been deprived of its water and water rights, not by the unauthorized act of a private individual, not by the act of the Power Company, but "*by the United States*".

The only argument now advanced by the Government as a reason for holding the National Defense Act inapplicable, and the requisition tortious, is apparently based upon the fact that the requisition order was directed to the Power Company and not to the petitioner, and upon the fact that the *res* taken by the Government was not water power, but the electricity produced or "capable of being produced" (the phrase occurs in both the order and the statute) by the use of that water power. The unsoundness of this argument, we believe, is adequately dealt with (though in another connection) at pages 16-22 of our main brief; and we do not believe that any lengthy discussion is required here.

At the time of the taking, there was certainly no doubt in the minds of the Government officials as to what they intended to do, and no doubt as to their statutory authority to do it. The Government intended that the Paper Company's supply should be absolutely cut off.

If there was any defect in authority under the National Defense Act, there was, we believe, ample authority for the taking under the Urgent Deficiency Appropriation Act of April 17, 1917, c. 3, 40 Stat. p. 28, which appropriated:

> "For the national security and defense, and for each and every purpose connected therewith, *to be expended at the discretion of the President*, and to be immediately available and to remain available until December thirty-first, nineteen hundred and seventeen, $100,000,000."*

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* The phrase "exigencies of *the national security and defense*", which repeatedly occurs in both the requisition order and the waiver (R. 58-9) is clearly borrowed from this Act, and indicates that the Secretary had it in mind, as well as the National Defense Act, when he made the seizure.

This appropriation was continued and made available until June 30, 1918, by the Urgent Deficiency Act of December 15, 1917, c. 3, 40 Stat. 429.

When read in connection with the National Defense Act, and even when considered altogether apart from that Act, we submit that this provision of the Urgent Deficiency Appropriation Act constituted ample authority for the action of the President through the Secretary of War in taking petitioner's water supply to increase the output of electrical power requisitioned by the Government from the Power Company's dynamos. Similar provisions of appropriation acts (much more limited in scope) were held by this Court in *United States* v. *North American Company*, 253 U. S. 330, 333, to furnish sufficient authorization from Congress for the taking of private property. In the case of *Hooe* v. *United States*, 218 U. S. 322, cited by the Government at page 7 of its brief, the claimant had received from the United States the entire amount of the appropriation specifically allotted by Congress for the subject matter of his claim (rent for quarters for the Civil Service Commission), and had, notwithstanding that fact, sued for additional compensation. It was held that under these circumstances there could be no implied contract by the United States to pay any additional sums, the claimant having voluntarily granted the use of his property to the Civil Service Commission with full knowledge of the limitation on the appropriation. In the *North American Company* case, on the other hand, this Court said at page 333:

> "The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in *Hooe* v. *United States*, 218 U. S. 322, does not exist here".

In view of the broad power granted by the wartime Urgent Deficiency Appropriation Act, we submit that the authority

of the President and the Secretary of War in this case cannot be disputed.

What the Government wanted at that time, what it was entitled, under the clear language of the statutes, to obtain by compulsory requisition, and what it in fact got, was power,—*all* the power that could be produced on the Power Company's dynamos by the use of *"all of the water capable of being diverted"* (R. 61) through the intake canal. This of necessity included, and was intended to include, the water theretofore used by petitioner as well as that used by the Power Company.

When the requisition order was made, the Government had full knowledge of petitioner's rights—had, in fact, taken some pains to inquire as to the extent of those rights (Finding X, R. 56)—and specifically intended to appropriate petitioner's property. The requisition order was a peremptory command,—an act of sovereignty and not an offer to negotiate. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220. By its terms, the Secretary of War undertook to make the requisition in the name of the President "and by reason of the exigencies of the national security and defense".

The order, moreover, was absolute and unconditional on its face. Petitioner's water supply was requisitioned, not by the Power Company, nor by the Secretary of War for the benefit of the Power Company, but by the United States. It was the United States which made the order, and the United States which took the property absolutely under its own control. It is true that by a separate instrument the United States undertook,—after the seizure was complete—to direct what use was to be made of the property which it had taken. But this fact did not render the taking any the less absolute, or any the less a taking *"by the United States"* (Finding XIV, R. 63). In directing that the electric power derived from the seized water supply should be supplied to a designated list of essential war industries, the Secretary of War was still "acting for and on behalf of the United States" and was providing for the "exigencies of the national security and defense",—and so stated, in so many words (Finding

XI, R. 59). It is altogether beside the point for counsel to say (Government's brief, p. 10):

> "We have been unable to find any statute or Executive Order authorizing the Secretary of War to take water rights for the generation of electricity by a private corporation *for the purpose of supplying current to private consumers.*" (Italics ours.)

No such thing was done. By the requisition order the Government took the power absolutely for its own use, and not for "private consumers". Admittedly, upon the making of the requisition order, the seizure became absolute, and the Government became entitled to employ the seized power for its own direct use and benefit: and if it had done so, presumably even Government counsel would admit the legality of the Secretary's act, and the validity of petitioner's claim. If, after the taking, the Government, instead of itself using the power which it had taken, chose rather to direct the manner in which it should be used to best advantage for the winning of the war, that fact cannot alter the nature of the taking, or operate to deprive the petitioner of its right to compensation. Nor can the fact that the Secretary of War, in the exercise of his best discretion, chose to employ the Government's property, after the seizure, in one way rather than in another, furnish adequate ground for counsel now to argue for the first time, thirteen years after the event, that the Secretary misused his discretion, mistook his authority, and became a tortfeasor and trespasser *ab initio*, whose acts the Government may with impunity disclaim and disavow.

Petitioner was not consulted as to the terms of the Power Company's waiver (R. 58-60) and was never permitted by the Government to receive either its own water or the electric power derived therefrom, so long as the requisition order remained in effect. To argue that the execution of this waiver by the Power Company "precludes the idea of there having been any appropriation by the United States" (Government's brief, page 12) is to confuse the essential distinction between the

rights of the Power Company and the rights of petitioner. The petitioner was the lessee of certain water rights from the Power Company, having, under the law of New York, a right to the use of its water amounting to a vested estate in realty. Its water rights were enjoyed adversely to those of the Power Company; and the mere fact that *after* the requisition order had been made, the *Power Company* saw fit to enter into negotiations with the United States as to the manner in which the United States should dispose of the power which it had taken and as to the manner in which the Power Company should receive the "fair and just compensation" guaranteed by the statute and promised by the requisition order, cannot affect *petitioner's* rights.

But the Government attempts to argue that petitioner's only remedy is an action sounding in tort against the Power Company. Such an action would be met at the threshold with the answer that the shut-off of petitioner's water was not effected by the Power Company, but by the United States Government, acting pursuant to statutory authority. In this connection, it is of interest to quote in full the letter written by Mr. Bulkley, as representative of the Secretary of War, to the Niagara Falls Power Company the day after the requisition order was signed:

"Council of National Defense,
Washington, December 29, 1917.

F. L. Lovelace, Esq.,

Niagara Falls Power Co., Niagara Falls, N. Y.

Dear Mr. Lovelace: I mailed yesterday to the Niagara Falls Power Company original requisition order signed by the Secretary of War, covering water power produced and delivered by said company. Enclosed with it was a temporary waiver of delivery, with attached schedule, for execution by the Niagara Falls Power Company. This is all in accordance with our conversations and correspondence and is all designed with a view to disturbing your company's contract relations with its customers as little as possible *while at the same time affording to it full protection against claims on the part of parties who are cut off.* I think you will agree that

the form as finally determined upon covers the purport of all the suggestions which you have made to us.*

Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity. Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut off.

With best wishes for a Happy New Year, I am,

Very sincerely yours,

RJB/G ROBERT J. BULKLEY.

(Italics ours.)

The contents of this letter, we believe, leave no doubt as to the intention of the Government in the premises.

Finally, it must be borne in mind that the acts in question were not merely the acts of zealous subordinate officials who might be inclined to overstep the limits of their authority, and whose actions the United States might subsequently disavow. On the contrary, the requisition of petitioner's water was a war measure taken in time of war by the Secretary of War in person,† after careful consultation with the authorities in the United States and in Canada, and after his personally designated representative, Mr. Bulkley, had fully investigated the situation and had been advised as to the nature of petitioner's rights (R. 55-57).

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* The first paragraph of this letter is omitted from the quotation contained in Finding XII of the Court of Claims at R. 61. The whole letter was, however, in evidence before the Court of Claims; and there is no dispute as to its authenticity or its accuracy. In view of the Government's departure from its previous line of argument, and from the theory on which it tried the case below, we believe we are justified in going outside the technical limits of the record in this Court to quote this letter in full.

† Mr. Newton D. Baker, former Secretary of War, was himself examined as a witness below, together with Mr. Bulkley, although, of course, their testimony does not appear in the record in this Court.

POINT II.

The taking of petitioner's water was not a mere "regulation" but was a substantial deprivation of property, for which compensation must be paid.

The Government has further attempted to argue that, assuming the Secretary of War had statutory authority to do what he did, nevertheless his acts amounted at most to a mere regulation and not to a taking of property; and in this connection it is now solemnly suggested by Government counsel that the course which petitioner should have pursued would have been to "refuse compliance" with the Government's requisition order "until assured of adequate protection" (Government's brief, p. 18).

If it was the intention of the Government merely to "regulate", without taking the petitioner's water supply, why did the Government proceed through the elaborate and well recognized form of a requisition or condemnation for public use? Above all, why did the Government specifically promise to pay "fair and just compensation"? If, as counsel now assert, the Government in 1917 and 1918 possessed the right to regulate petitioner's business and property to the point of extinction without being under any liability to pay compensation, it is certainly somewhat odd that no such idea at that time appears to have occurred to any of the officials connected with the transaction.

It may be conceded that under certain circumstances (particularly under the commerce clause) the Government may regulate or limit the use of private property in the public interest. But the act here complained of was not a mere regulation, but a total deprivation. The taking of petitioner's property could not have been more complete or more effective had the Government sent armed troops to occupy petitioner's plant. No case cited by counsel is authority for

the proposition that the Government, even in war time, can forcibly take from a private citizen his real property, and can then refuse to pay compensation upon the ground that the property has not been taken, but has merely been "regulated" in the interests of the Government. The cases cited by the Government at page 18 of its brief were all cases involving Federal or state regulation of carriers, and do not sustain the propositions to which they are applied. Governmental regulation in the sense that under Government order coal in transit, for instance, may be diverted to a designated purchaser is one thing, even though the new destination may result in a slightly lower price per ton. Here the citizen affected is paid for his property. But where by virtue of a direct expropriation the Government takes a citizen's property outright without the citizen receiving compensation of any kind, surely the Government's liability cannot be lightly avoided merely on the assertion that it constitutes a "regulation".

We are at a loss to understand the basis for the argument, repeatedly advanced in the Government's brief, to the effect that petitioner "was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights" (p. 12), and to the effect that petitioner should have "refused to comply" (pp. 5, 18) with the Government's requisition order until assured of compensation. We may note, in passing, that refusal to comply with the provisions of Section 120 of the National Defense Act is by that section penalized as a felony. And even apart from that fact, in this case a refusal was physically impossible. The petitioner had nothing to say about the shutting off of its water, and could do nothing to prevent it. It must be remembered that petitioner had no independent source of water under its own physical control. Its supply was not derived directly from the bed of the Niagara River, but from a canal which tapped the main intake canal of the Power Company (see sketch at R. 14a; cf. Finding II, R. 48). When this source was cut off, under the Government's orders, there was nothing for peti-

tioner to do save to shut down its mill. No motive power was left to run the machinery. Petitioner could not have renewed its supply of water, or prevented the cut-off, in any way short of physically taking possession of the intake canal, which would, of course, have required an armed invasion of the Power Company's plant and an attack upon the United States troops who guarded it. Does the Government seriously contend that this is what we should have done?

Nor can we understand what the Government means when it says in its brief (p. 18):

> "Nor does the fact that the Government made no provision for the payment of compensation to the petitioner affect the nature of its action as a regulatory measure. It was doubtless assumed that the petitioner would make such charge as it deemed necessary and collect the same from the companies to which its power was furnished."

The petitioner at no time was engaged in furnishing power to any other company, and had no means of recompensing itself at the expense of others. On the contrary, the findings are clear that all of petitioner's water was used for the purpose of operating the machinery in its own mill (R. 48, 54). When it was cut off, operations at the mill, of necessity, came to a stand-still; and the mill remained shut down until the requisition order was abrogated at the close of the war.

POINT III.

Petitioner is entitled to interest as a part of the just compensation guaranteed to it by the Constitution.

The Court of Claims found (Finding XXII, R. 64) that by reason of the taking of its water supply by the Government, the petitioner sustained "an actual out-of-pocket or direct overhead expense of $304,684.26".

Petitioner submits that to this amount it is entitled to add interest at 6% (the legal rate in New York State) from the date of the taking, in order to secure the "just compensation" to which it is entitled under both the Constitution and the National Defense Act.

This claim is disputed in Point IV of the Government's brief at page 20, the Government taking the position that the recovery to which petitioner is entitled in this case cannot include interest, by reason of the provisions of Section 177 of the Judicial Code.

In attempting to distinguish the numerous cases in this Court which have held that interest may properly be included as a part of the "just compensation" to which a claimant is entitled when his property is taken by the United States, counsel state:

> "But in each of these cases the property was taken pursuant to express statutory authority, without the consent of its owner, and in each case recovery was had under a statute which expressly provided for 'just compensation'."

We are at a loss to understand why this language is not directly applicable to the case at bar. Here our property was certainly taken without the consent of the owner. It was taken pursuant to the provisions, not only of the Constitution, which guarantees just compensation, but of a statute (the National Defense Act), which likewise specifically guarantees "fair and just compensation". Petitioner was not paid for its property at the time of the taking, and has not been paid since. It is entitled now to be put in as good a position as if it had been paid contemporaneously with the taking; and the payment of such additional sums as may be necessary for this purpose is not prohibited by Section 177 of the Judicial Code.

The only case cited by the Government in support of its position is *United States* v. *North American Transportation and Trading Company*, 253 U. S. 330. The inapplicability

of that decision to situations such as the present has more than once been pointed out by this Court, notably in *Seaboard Air Line Railway Company* v. *United States*, 261 U. S. 299, 305, and in *Phelps* v. *United States*, 274 U. S. 341, 344, where the Court said:

> "The distinction between the cause of action considered in *United States* v. *North American Co.*, 253 U. S. 330, and a taking under the power of eminent domain was pointed out in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299. Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking."

CONCLUSION.

The judgment of the Court of Claims should be reversed, and the cause remanded, with directions to award proper compensation to the petitioner, in accordance with the findings of the Court of Claims.

Respectfully submitted.

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APPENDIX.

Statutes Involved.

In this case, it is obvious that the Secretary of War intended to make the requisition under the authority of Section 120 of the National Defense Act; and it is our position that this statute, supplemented if necessary by the authority of the Urgent Deficiency Appropriation Acts cited at p. 7 of this brief, furnishes ample authority for his acts. However, it would probably be equally possible to justify the taking under the authority of the Naval Emergency Fund Act of March 4, 1917, as amended. This latter Act is not confined, as the Government's brief attempts to argue, to the requisisition of ships, but extends to all "war material", which is defined in the Act as including "arms, armament, ammunition, stores, supplies and equipment for ships and airplanes, and everything required for or in connection with the production thereof".

For the convenience of the Court, we here reproduce the whole of Section 120 of the National Defense Act, and the relevant portions of the Naval Emergency Fund Act, and of the applicable Appropriation Acts.

National Defense Act.

Section 120 of the National Defense Act (Act of June 3, 1916, ch. 134, 39 Stat. 166, 213), now embodied in United States Code, Title 50, Section 80, provides as follows:

> "SEC. 120. *Purchase or Procurement of Military Supplies in Time of Actual or Imminent War.* The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the

nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon con-

viction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

The Secretary of War shall also make, or cause to be made, a complete list of all privately owned plants in the United States equipped to manufacture arms or ammunition, or the component parts thereof. He shall obtain full and complete information regarding the kind of arms or ammunition, or the component parts thereof, manufactured or that can be manufactured by each such plant, the equipment in each plant, and the maximum capacity thereof. He shall also prepare, or cause to be prepared, a list of privately owned manufacturing plants in the United States capable of being readily transformed into ammunition factories, where the capacity of the plant is sufficient to warrant transforming such plant or plants into ammunition factories in time of war or when war shall be imminent; and as to all such plants the Secretary of War shall obtain full and complete information as to the equipment of each such plant, and he shall prepare comprehensive plans for transforming each such plant into an ammunition factory, or a factory in which to manufacture such parts of ammunition as in the opinion of the Secretary of War such plant is best adapted.

The President is hereby authorized, in his discretion, to appoint a Board of Mobilization of Industries Essential for Military Preparedness, nonpartisan in character, and to take all necessary steps to provide for such clerical assistance as he may deem necessary to organize and coordinate the work hereinbefore described."

Naval Emergency Fund Act.

This Act is a portion of the Naval Appropriation Act of March 4, 1917, ch. 180, 39 Stat. 1168, at pages 1192-1193. The relevant portions thereof are as follows:

"To enable the President to secure the more economical and expeditious delivery of materials, equipment,

and munitions and secure the more expeditious construction of ships authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers and such other naval small craft, including aircraft, guns and ammunition for all of said vessels and aircraft and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or . much thereof as may be necessary, and to be immediately available.

In addition to the eighteen submarines hereinbefore appropriated for, the Secretary of the Navy is hereby authorized and directed to proceed at once to cause to be constructed twenty coast submarines to have a surface displacement of about eight hundred tons each at a cost not to exceed $1,300,000 each, exclusive of armor and armament, on the most approved lines according to plans and specifications to be provided or adopted by the Secretary of the Navy. The same may be let by contract to private builders or constructed by the Government in navy yards, or both, as may be directed by the Secretary of the Navy. Said twenty submarines shall be constructed on the Pacific coast: *Provided,* That the cost of construction on the Pacific coast does not exceed the cost of construction on the Atlantic coast plus the cost of transportation from the Atlantic to the Pacific. Eighteen million dollars is hereby appropriated toward the construction of said submarines.

(a) That the word 'person' as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word 'ship' shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words 'war material' shall include arms, armanent, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word 'factory' shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the buildng, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and,

> within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.
>
> Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory."

This last section is of particular significance. It authorizes the President to requisition "any factory or any part thereof without taking possession of the entire factory". In the case at bar, petitioner's water rights, under the laws of New York, constituted real property which was appurtenant to, and a part of, petitioner's Niagara Falls mill (Petitioner's main brief, pp. 11-15). When the Government took those water rights, we submit that it took a part of petitioner's factory without taking possession of the entire factory, within the language of this Act.

Appropriation Acts.

In the Urgent Deficiency Act of April 17, 1917, ch. 3, 40 Stat., at page 28, the sum of $100,000,000. was made available for the national security and defense, at the discretion of the President, in the following language:

> "For the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President, and to be immediately available and to remain available until December thirty-first, nineteen hundred and seventeen, $100,000,000."

The broad language of this statute, we believe, would furnish ample authority for the acts of the Secretary of War in this case, even if it should be held that the National Defense Act, standing alone, is insufficient. See *U. S.* v. *North American Co.*, 253 U. S. 330, 333.

By the Act of December 15, 1917, ch. 3, 40 Stat. 429, the time within which this appropriation was made available was extended to June 30, 1918. A further appropriation of $50,000,000 for the fiscal year 1918-19, was granted, in the same broad terms, by the Act of July 1, 1918, c. 113, 40 Stat. 634, 635.

In the Urgent Deficiency Appropriation Act of October 6, 1917, ch. 79, 40 Stat. 345, at page 369, there was a further appropriation of $100,000,000. to be expended at the direction and in the discretion of the President for such war purposes as he might deem fit.

The provisions of this section of the Act are as follows (40 Stat., at p. 369):

> "To enable the President to secure the more economical and expeditious delivery of materials, equipment, and munitions, and secure the more expeditous construction of ships authorized, and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $100,000,000."

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In the Supreme Court of the United States

OCTOBER TERM, 1929

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1929

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INTERNATIONAL PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 65–74) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on November 4, 1929. (R. 74.) Petition for certiorari was filed January 23, 1930. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Did the requisition by the President, because of the exigencies of national security and defense, of

the distribution of the electrical power capable of being produced by the Niagara Falls Power Company by the utilization of all the water it was authorized to divert from the Niagara River under its license from the Secretary of War, a portion of which water the Power Company was legally bound to deliver to the petitioner at the time of the President's order of requisition and which in compliance with said order it failed to deliver, entitle the petitioner to a judgment for compensation against the United States?

STATEMENT

Petitioner owned and operated a plant for the manufacture of paper near and above the falls of the Niagara River. The power for the plant was derived exclusively from water of the Niagara River. (R. 47.) This was drawn from the canal of the Niagara Falls Power Company. (R. 47–48.) The petitioner's authority to draw and use this water was derived under various instruments from the Niagara Falls Power Company, conveying that right under the laws of the State of New York. (R. 53, 54, 56–58.)

In 1917 the Niagara Falls Power Company, under a revocable license from the Secretary of War, and pursuant to private conveyances of lands abutting on the Niagara River and letters patent from the State of New York, and under the privilege of special Acts from the State of New York, was diverting 10,000 c. f. p. s. of water from the Niagara River. (R. 51–52.) From this total

amount 720 c. f. p. s. were allocated by the Niagara Falls Power Company to the petitioner's mill (R. 54), the balance being used by the Power Company to generate electricity for commercial purposes.

On December 28, 1917, after investigation by the Council of National Defense (R. 55–56) under authority of the President, and "by reason of the exigencies of the national security and defense," the Secretary of War requisitioned the total quantity and output of the electrical power which was capable of being produced and/or delivered by the Niagara Falls Power Company through the use of all water of the Niagara River diverted or capable of being diverted through its intake canal. It was stipulated in the requisition that just compensation would be paid for power delivered thereunder. (R. 58.)

The Secretary of War advised the Power Company that this requisition contemplated the use of all waters originally diverted from the Niagara River by the Niagara Falls Power Company, and particularly included that formerly allocated to the petitioner. (R. 61.) Coincidentally with the making of the requisition there was delivered to the Power Company a tentative schedule of approved consumers accompanying a temporary waiver (R. 58–61), which, in substance, provided that the United States would waive its demand for the exclusive power output of the Niagara Falls Power

Company, provided the power developed by the Company should be expended in accordance with the schedule. The Niagara Falls Power Company waived all rights to compensation from the Government, but was paid by the individual consumers for the power furnished. (R. 58–61.)

The petitioner was not among those listed as being entitled to power or other service from the Niagara Falls Power Company. (R. 61.) The manufacture of the particular character of paper produced in the petitioner's Niagara mills was not designated as an essential industry in the prosecution of the war. (R. 55.) On February 7, 1918, the petitioner ceased using the water from the canal of the Power Company, and did not resume the use of such water until November 30, 1918, when the prior order of requisition was abrogated. (R. 62.) During this entire period the Power Company, acting by and under the authority of the War Department, appropriated and used all the water diverted from the Niagara River through its canal and did not deliver any water to the petitioner. (R. 62, 63.)

The Paper Company has never been compensated by the United States or anyone else for the losses suffered by it as a result of being deprived of its water power. (R. 63.)

ARGUMENT

I

THE SUBSTANTIAL EFFECT OF THE ACTION OF THE SECRETARY OF WAR WAS THE SAME AS IF HE HAD REVOKED THE LICENSE OF THE NIAGARA FALLS POWER COMPANY, AND SUCH A REVOCATION WOULD HAVE IMPOSED NO LIABILITY ON THE UNITED STATES

Pursuant to authority granted to the Secretary of War by statute (Resolution of January 19, 1917, c. 18, 39 Stat. 867; Resolution of June 30, 1917, c. 34, 40 Stat. 241; see also Resolution of June 29, 1918, c. 111, 40 Stat. 633) "permission, revocable at will" by the Secretary of War (R. 51–52) was given the Niagara Falls Power Company to divert water from the Niagara River for the creation of power. The petitioner's right to use this water was derived from the Power Company, and it had no higher rights than those possessed by the Power Company.

The license granted to the Power Company was, under the statute and by its terms, revocable at will. That which actually occurred was no different in substantial effect than what would have occurred if the Secretary of War had in terms revoked the license of the Power Company and then granted to it a new license with the condition that none of the water should be furnished to the petitioner. No liability would have been incurred by the United States through such a revocation of a license which was in terms revocable. The rights of the petitioner, we submit, can not be greater because this was not the precise form which the

transaction took, when the substantial effect was the same.

The requisition of the Secretary of War was in substance and effect a qualification of the revocable license previously issued by him to the Power Company.

II

THERE WAS NO TAKING OF ANY PROPERTY BELONGING TO THE PETITIONER

Whether or not the interests of the petitioner were in the nature of real rights, the decisions in New York show that these rights were subject to the paramount right of the public. *People ex rel. Niagara Falls Hydraulic Power & Mfg. Co.* v. *Smith,* 70 App. Div. 543, 546, affirmed without opinion, 175 N. Y. 469; *United Paper Board Co.* v. *Iroquois Pulp & Paper Co.,* 226 N. Y. 38, 49. In the first of these cases the court referred to—

> the paramount right of the state to utilize these waters for a public use, without compensation to such riparian owners.

The petitioner was not a riparian owner. Its rights were derived solely through its agreements with the Niagara Falls Power Company. The Government did not take legal title nor physical possession of any property, and certainly not of any property of the petitioner. As the court below said (R. 71):

> What the Government took by the requisition order, if it took anything, was the prod-

> uct of the Niagara Falls Power Company. It did not take its plant or the use of it. It did not take its canal. It took what power it could produce and was producing from the entire plant; that is, as stated, it took the product of the plant, not the plant.

Acting in its sovereign capacity the Government diverted the power produced by the plant to the use of industries deemed essential in the conduct of the war. The consequential loss to the petitioner from this act of the Government was not, it is submitted, a direct appropriation, nor a taking of the petitioner's property within the meaning of the Fifth Amendment.

The petitioner's rights derived under its agreements with the Power Company, being subject to the paramount authority of the Government, and the loss to the petitioner being consequential only, the case comes within the rule of *Omnia Commercial Co.* v. *United States,* 261 U. S. 502. In that case this Court said (pp. 511, 513):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.
>
> * * * * *

> If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject matter, does not thereby take the contract.
>
> * * * * *
>
> The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, *the capacity output of factories and other producing activities.* If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future *service* or *delivery,* the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things. (Italics ours.)

The decision in *A. W. Duckett & Company* v. *United States,* 266 U. S. 149, is distinguishable. In commenting on the *Omnia case,* the Court said in the *Duckett case* (p. 152):

> The contract was no part of the *res* taken and whatever might be the collateral consequences of the appropriation liability for them was not an incident of the Government's act. * * * Here the claimant's possession under its lease was a part of the *res,* and therefore was within the implied promise to pay.

The distinction is stated and discussed in the opinion of the court below (R. 71–72) in the following language:

> By reason of the alleged taking, the contract to furnish so much water to the plaintiff was frustrated, not taken. The situation, as far as the principle involved is concerned, is the same as in the *Omnia Commercial Co. case,* 261 U. S. 502, 511. The damage to the plaintiff was incidental. The Government did not take plaintiff's plant or its contract with the Niagara Falls Power Company, nor did it intend to take it.
>
> In this case the Government, if it took anything, did not take the res, as it was held in the *Duckett case,* 266 U. S. 149, that it did. There it took over the whole terminal plant, and the plantiff was the lessee of a portion of it, and it was held that the taking over of the res took his lease, which was a part of the res, but in the case at bar the Government did not take the res, it did not take over the plant or its operation or its use. It simply commandeered the output or product of the plant, that is, such power as the plant under the conduct and management of the company was able to turn out, and this is as close to what was done in the *Omnia Commercial case, supra,* as we could well have it without having the identical facts. In that case plantiff had a contract antedating the taking, under which the company was to furnish it so many tons of steel at a given price for which it had already

paid. The court held that the contract was not taken, but frustrated, and that it was an incidental loss for which there was no recovery, a loss incident to the legitimate exercise of a sovereign right by the Government.

But, further, by the subsequent contract with the Niagara Falls Power Company by which the plaintiff was deprived of its rights, the Government did not even appropriate or receive the product, as in eminent domain, of the Niagara Falls Power Company for public use, but, on the contrary, it was furnished to and received by those corporations named in said schedule, with the consent of said company. It controlled the distribution of the product under a contract with that company, in which contract that company expressly waived all claims for damage, if any there were, by reason of the previous requisition to which this contract was the successor. The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned.

III

IF THE PETITIONER HAS ANY RIGHT OF INDEMNITY, IT IS AGAINST THE POWER COMPANY

The Power Company is responsible in damages for failure to supply the stipulated quantity of

water to the petitioner unless excused by impossibility of performance.

The Power Company during the period in question sold the electric power, which it generated by using the water diverted from the petitioner, to essential industries approved by the War Department. It received compensation therefor presumably adequate. The demand for power in the vicinity exceeded the available supply. The standard price for electric energy increased from the rate of $20 per horsepower per annum on November 1, 1917, to a rate varying between $33 and $47.05 per horsepower per annum between February 7, 1918, and November 30, 1918. (Finding XXIII; R. 65.) Of the total water power utilized by the Power Company during this period the proportion to which petitioner would have been entitled was 7.2 per cent, for which it would have been obligated to pay at the rate of $75,562.50 per annum. (R. 54.)

The Government received no pecuniary benefit from the transaction. To permit the petitioner to recover a judgment against the United States, and thus in effect to exempt the Power Company from liability for the diversion of the water, would result in the unjust enrichment of the Power Company.

CONCLUSION

The case turns on its own peculiar facts and, we submit, was correctly decided below. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The opinion of the Court of Claims (R. 65–74) is reported in 68 C. Cls. 414.

JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1929. (R. 74.) Petition for certiorari was filed January 23, 1930 (R. 74), and the writ was granted April 14, 1930 (R. 75), 281 U. S. 710. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Did the alleged requisition by the President of the total amount of electricity which the Niagara Falls Power Company was capable of producing by the utilization of all water capable of being diverted

through its canal, a part of which water was owned by the petitioner, and the accompanying waiver agreement under which the Power Company agreed to distribute such power solely to certain designated private consumers, constitute such a taking of petitioner's property by the United States for public use as to entitle the petitioner to receive compensation under the Fifth Amendment?

STATUTES INVOLVED

A summary of certain emergency legislation relating to appropriation of private property for use by the United States will be found in the Appendix, *infra*, pp. 22–27.

STATEMENT

Petitioner owned and operated a plant for the manufacture of paper near and above the Falls of the Niagara River. The power for the plant was derived exclusively from water of the Niagara River. (R. 47–48.) This was drawn from the canal of the Niagara Falls Power Company pursuant to certain deeds, leases, and agreements between the two companies and their predecessors. (R. 53, 54, 56–58.) The right of the Niagara Falls Power Company to divert water from the Niagara River was derived from private conveyances of land abutting on the river, letters patent from the State of New York, and special acts of the New York Legislature. (R. 48–50.) The Power Company also enjoyed a revocable license issued by the Secretary of War, author-

izing it to divert a specified amount of water from the river. (R. 50.)

In 1917 the Council of National Defense determined that the manufacture of newsprint paper was not an essential war industry. (R. 58.) On December 28, 1917, the Secretary of War, in the name of the President, issued an order purporting to requisition on behalf of the United States the total quantity and output of the electrical power which was capable of being produced and/or delivered by the Niagara Falls Power Company through the use of all waters diverted or capable of being diverted through its intake canal. It was stipulated in the requisition that just compensation would be paid for power delivered thereunder. (R. 58.)

The Secretary of War advised the Power Company that this requisition contemplated the use of all waters originally diverted from the Niagara River by the Power Company and particularly included that formerly allocated to the petitioner. (R. 61.) Simultaneously with the issuance of the requisition order there was executed an agreement between the Secretary of War and the Power Company, which, in substance, provided that in consideration of the waiver by the United States of its right to receive the output of the power plant, the Power Company would waive all rights to compensation from the Government and would distribute its power solely to certain consumers listed in a schedule attached to the agreement. (R. 58–61.)

The petitioner was not among those listed as being entitled to power or to other service from the Power Company. (R. 61.) On February 7, 1918, the petitioner ceased using water from the canal of the Power Company and did not resume the use of such water until November 30, 1918, when the prior requisition order was revoked. (R. 62.) During this entire period the Power Company appropriated and used all the water diverted from the Niagara River through its canal and did not deliver any water to the petitioner. (R. 62–63.)

The Paper Company has never been compensated by the United States or anyone else for the losses suffered by it as a result of being deprived of its water power. (R. 63.)

SUMMARY OF ARGUMENT

It does not appear that the action of the Secretary of War acting in behalf of the President was expressly or by necessary implication authorized by Congress. Congress had, at most, sanctioned the requisitioning of products of plants. This is not to be construed as authorizing the appropriation of real property belonging to a third person for the purpose of increasing the productive capacity of a generating plant. No legislative enactment has been found which is applicable to the instant case. In the absence of such authorization the acts of public officers do not bind the Government.

There was no taking by the United States. The requisition order when issued was modified by agreement that the Government should not receive

electrical power. Moreover, the requisition itself was directed to the product or output of the power plant; the *res* which the Secretary of War purported to commandeer was electricity, not water or hydraulic power. *Duckett & Co.* v. *United States*, 266 U. S. 149, is not controlling.

The purpose and effect of the action of the Secretary of War was to regulate the distribution of electrical and hydraulic power rather than to appropriate such power to the United States. The nature of the interference with petitioner's property was essentially similar to the regulation of the coal and coke industries under the Lever Act. If the petitioner considered such regulation to be unreasonable or unauthorized, it could have refused to obey until provision had been made for the granting of adequate compensation.

If the action of the Secretary of War, considered as regulatory, was unauthorized, the injury complained of was a tort for which the petitioner can not recover from the United States. The Power Company was then a joint tort-feasor and is liable as such. Since the Power Company received the direct pecuniary benefit of the taking, there is no injustice in leaving the petitioner to seek its remedy in an action against that company.

If entitled to any recovery, petitioner may not recover interest in the Court of Claims. The suit is not predicated upon any statute allowing just compensation. It was not instituted by the Government for the condemnation of property. It was

brought in the Court of Claims, and the right to bring it there was dependent upon the existence of an implied contract, entered into by the United States. If any contract could be implied, which we dispute, it would be to pay the value of the property as of the date of its taking, and interest could not be added, because of Section 177 of the Judicial Code.

ARGUMENT

I

IT DOES NOT APPEAR THAT THE ALLEGED TAKING OF PETITIONER'S WATER RIGHTS WAS, EXPRESSLY OR BY NECESSARY IMPLICATION, AUTHORIZED BY LEGISLATIVE ENACTMENT, AND IN THE ABSENCE OF SUCH AUTHORIZATION, PETITIONER IS WITHOUT RECOURSE AGAINST THE UNITED STATES

To entitle a claimant to recover compensation from the United States for expropriation of his property by the Government, it must appear that the act of taking was authorized by Congress. This is true, because the right to recover must be founded either on a statute authorizing the payment of compensation or on a contract express or implied to pay for what is taken. In the absence of authority to appropriate the property there can be no contract express or implied and the taking is tortious if the owner has not assented. The injured party is therefore without recourse against the Government in the courts.

Although petitioner has proceeded on the assumption that authority was vested in the Secretary of War to take the water alleged to have been taken and thus to bind the United States to pay for it, we respectfully submit that the existence of such authority is not apparent. The proceedings appear to have been instituted under Section 145 of the Judicial Code (U. S. C., Title 28, Section 250), which confers upon the Court of Claims jurisdiction to hear and determine all claims "founded upon the Constitution of the United States or any law of Congress, * * * upon any contract, express or implied, with the Government of the United States * * * ." A claim for compensation by reason of expropriation of property presupposes a taking by the United States. There is no taking by the United States unless the taking is expressly or impliedly authorized by Congress.

The principle governing this phase of the right to compensation under the Fifth Amendment was discussed by this Court in the case of *Hooe* v. *United States*, 218 U. S. 322, where it was argued that the claim could be rested exclusively on the Constitution, without reference to any statute. This Court said (pp. 335, 336):

> The argument is ingenious but it is unsound. * * * If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in

> any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, can not create a claim against the Government "founded upon the Constitution." * * * The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.

To the same effect are *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 330; *Baltimore and Ohio Railroad* v. *United States*, 261 U. S. 592; *Mitchell* v. *United States*, 267 U. S. 341; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200. Cf. *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 54–57; *Whiteside* v. *United States*, 93 U. S. 247, 257.

Petitioner does not cite any legislative enactment showing that the act of the Secretary of War was the act of the Government. The findings of the Court of Claims do not determine the question. Finding XIV (R. 63) states that the petitioner has received no compensation on account of the water and water rights "of which it was deprived as aforesaid between February 7, 1918, and November 30, 1918,

by the United States." If this be more than a mere conclusion of law it must be read in the light of the preceding findings and, when so read, does not, we submit, find the fact that the Secretary of War was acting within the scope of his authority. Such authority depends on legislative enactment conferring authority either on the President or on the Secretary of War. If the former, there must also be an Executive Order delegating authority to the Secretary. Of these matters this Court takes judicial notice.

In the Appendix (*infra*, pp. 22–27) we have summarized certain war-time legislation which might conceivably be interpreted as applicable to the instant case. We believe that this list is comprehensive both as to statutes in effect when the requisition order was issued and as to statutes thereafter enacted which might conceivably be interpreted as ratifying the action of the Secretary of War. We believe that the statutes thus summarized fail to authorize or ratify the acts of the Secretary of War in question.

Several statutes, such as the National Defense Act (*infra*, pp. 22–23), gave the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these statutes that the Secretary of War assumed, in behalf of the President, to requisition the output of the power plant in the instant case. But the grant of authority merely to requisition the product of a power plant does not authorize the taking of water power from a third party in order to increase the productive

capacity of the plant. We have been unable to find any statute or Executive Order authorizing the Secretary of War to take water rights for the generation of electricity by a private corporation for the purpose of supplying current to private consumers.

It is urged that the requisition of the capacity output of the power plant necessarily involved a requisition of petitioner's water, and that such was the intent of the Government. But it does not appear that the President or the Secretary of War was entitled to requisition anything other than electric power which the Power Company could produce by means of facilities and materials over which it had control.

The instant case is clearly distinguishable in this respect from *Duckett & Co.* v. *United States*, 266 U. S. 149, and the cases cited on page 16 of petitioner's brief. In the *Duckett case* Congress had authorized the seizure of transportation systems, and the appropriation of the physical property necessarily involved a taking of the lessee's interest in such property. Similarly, in the cases cited on page 16 of petitioner's brief, the injuries complained of were the direct and necessary consequences of authorized acts.

Electrical energy was not the product of the Paper Company's mill, nor even *a* product thereof. The Court of Claims found (R. 54) that the machinery with which the mill was equipped "could be driven only by water power applied directly." Nor was water power a product of the plant; it was, as petitioner states, appurtenant to the realty on which the mill was situated. Consequently, it does not appear

that the taking of petitioner's water, if it *was* taken in the constitutional sense, was pursuant to any authority expressly or impliedly granted by Congress. In the absence of such authority, petitioner can not recover. Its cause of action sounds in tort, for which the Government can not be sued.

II

THE ACTION OF THE SECRETARY OF WAR DID NOT AMOUNT TO A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT

Petitioner bases its alleged right to recovery in this action on an appropriation of its water rights by the United States, giving rise to an implied promise to pay compensation. The original requisition order of December 28, 1917, was addressed to the Niagara Falls Power Company, and in terms appropriated the product or output of the power plant. No reference was made therein to the Paper Company. The Power Company was instructed to deliver to the United States the total quantity of electrical power which it was capable of producing. Thus the *res* which was taken by the United States was "the total quantity and output of the electrical power," and not, as petitioner states (Brief, p. 17) "the use of all waters diverted or capable of being diverted" through the canal. The Government did not want water power, and did not take it. It did intend, as petitioner states (Brief, p. 17) that use should be made by the Power Company of water theretofore used by the Paper Company. But it does not follow from this

that the Government intended to expropriate the water. The petitioner was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights either to the United States or to the Power Company. Thus there was no physical taking by the United States of any property belonging to the Paper Company, and the case is distinguishable from *Duckett & Company* v. *United States*, *supra*, because there the Government acquired physical possession and enjoyment, for its own purposes, of the claimant's leasehold and the appropriation was authorized by statute.

Coincidently with the requisition in the instant case, an agreement was made between the United States and the Power Company under the terms of which delivery of electricity to the Government was expressly waived, and the Power Company was required to make delivery thereof to customers approved by the Government. The execution of the waiver precludes the idea of there having been any appropriation by the United States even of the power produced by the Power Company. Ultimately the Government took nothing, and assumed only to regulate the selection of the Power Company's sale of its product to essential industries. If, as petitioner argues (Brief, p. 17), electrical power is the *alter ego* of water power, then since the Government did not take electricity it did not take water.

There can be no recovery under the Fifth Amendment unless property is actually taken and used by the sovereign for a public purpose. *Legal Tender*

Cases, 12 Wall. 457; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Wisconsin, &c., R'd Co.* v. *Jacobson*, 179 U. S. 287; *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146.

The jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property must rest on the receipt of a consideration moving to the United States. *Bothwell* v. *United States*, 254 U. S. 231. Counsel for the Government are not aware of any case in which the sovereign has been required to pay compensation where there has been no direct transfer of property to and for the use of the sovereign; nor do petitioner's citations disclose the existence of such liability.

As this Court said in *Interocean Oil Co.* v. *United States*, 270 U. S. 65, at page 69:

> There was no enrichment of the Government to its knowledge, no benefit in the form of property given to it or of service rendered to it from which the contract by it to pay could be implied.

Consequently, we submit, petitioner can not recover from the United States for such loss as it may have sustained.

The instant case, although not necessarily controlled by *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, is more closely comparable to it than to the *Duckett case*. In the *Omnia case*, the Government requisitioned the capacity output of a steel plant, thereby making it impossible for the steel company

to execute its contract to furnish steel to the claimant. This Court held that since the Government had not taken claimant's contract, claimant was without recourse against the United States. The decision, we believe, was based not only on the nature of the claimant's rights, but also on the nature of the interference with those rights. The requisition *necessarily* occasioned a loss to the claimant, just as in the instant case; but the interference was only indirect and did not amount to a taking.

III

THE INTERFERENCE WITH PETITIONER'S PROPERTY WAS, AT MOST, A RESULT OF THE EXERCISE OF THE POWER OF THE UNITED STATES TO REGULATE INDUSTRY AND THE USE OF NATURAL RESOURCES IN TIME OF WAR, FOR WHICH NO COMPENSATION IS PAYABLE

In the latter part of 1917, the Secretary of War was advised that there was a disposition on the part of the Canadian Power Administrators to forbid the exportation to the United States of power developed on the Canadian side of the Niagara River for the reason, among others, that a portion of the power generated at Niagara Falls was being used for industries which were not essential for the prosecution of the War. (R. 55.) It, therefore, became necessary to control the distribution of power generated on the American side of the river to the end that such power might be devoted solely to essential war industries.

Under Section 25 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276), Congress had authorized the President to regulate the distribution of coal and coke, but the authority did not in terms extend to distribution of electrical or hydraulic power. The National Defense Act (Act of June 3, 1916, c. 134, 39 Stat. 166; *infra*, pp. 22–23), authorized the President in time of war, to commandeer the output of any factory or plant or to take over such plant and operate it through the Ordnance Department of the United States Army. A formal requisition order was accordingly addressed to the Niagara Falls Power Company, and this was immediately followed by the waiver agreement under which the Power Company was allowed to distribute its product to certain essential industries. It seems reasonably clear that the order and the agreement taken together were intended to regulate the Power Company's activities rather than to appropriate its property for use by the United States. We submit that this was not a taking by the Government. The Court of Claims did not find that petitioner demanded compensation and it might be inferred that petitioner tacitly consented to the diversion of its water in the expectation of receiving payment from the Power Company just as the Power Company consented to a regulation by the Government in the expectation of receiving compensation from its customers.

The situation is somewhat analogous to that arising under the Lever Act in connection with the regulation of sales of coal and coke. The regulations

promulgated under that Act were directed both to price and to distribution. In many cases the price which the producer was permitted to charge was substantially lower than what he would have been able to exact in the absence of regulation, but this Court has held that the regulations did not constitute a taking of property by the Government and that no promise to pay the difference in price could be implied. *Morrisdale Coal Company* v. *United States*, 259 U. S. 188.

In *Pine Hill Coal Company, Inc.* v. *United States*, 259 U. S. 191, the claimant alleged that the prices fixed by the Government on sales to third persons were unreasonable and that the receipts were actually less than the cost of production. It attempted to set up a contract of indemnity on the part of the United States based on Section 25 of the Lever Act which provided that in the event the prices fixed for property taken by the United States were not satisfactory, the person entitled to the same should be paid 75% of such price and should be permitted to bring action against the United States for the balance necessary to furnish just compensation. This Court affirmed the judgment of the Court of Claims sustaining a demurrer and held that the statute did not apply to sales by producers to third persons.

In *Atwater & Co.* v. *United States*, 275 U. S. 188, where the claimants, in obedience to the orders of the Fuel Administrator, had consigned coal to a coal exchange, the Government was held not liable for damages arising out of the failure of the exchange to

credit promptly to the claimant the amount of coal so shipped. The basis for the Court's decision was that there was no taking and no implied contract to pay compensation. The Court said (p. 191):

> No part of claimant's coal was consumed or appropriated by the Government.

The argument of petitioner herein that the United States took electrical power (including all water used in the generation of such power) and subsequently distributed it to essential industries would be equally applicable to the fuel cases. Yet, so far as counsel are aware, the point was never made that in regulating the distribution of fuel the Government was expropriating such fuel and selling it, even for the account of the producers, to the public. Had that contention been sustained, it would seem that the various claimants would have been entitled to receive compensation from the Government if they had been able to show that what they received from their customers was not a fair return. Nevertheless, this Court specifically held that there was no taking and no implied promise to pay.

In the instant case, the regulation was directed to distribution rather than to price. Had the petitioner been engaged in the business of supplying power to other consumers, there can be no doubt that the Government could have required it to distribute power exclusively to essential industries. We submit that the fact that petitioner was itself using the power for a non-essential industry (as determined by the Council of National Defense under the Act of August

29, 1916, c. 418, 39 Stat. 619, 649) does not in any way affect the Government's rights in this respect. Nor does the fact that the Government made no provision for the payment of compensation to the petitioner affect the nature of its action as a regulatory measure. It was doubtless assumed that the petitioner would make such charge as it deemed necessary and collect the same from the companies to which its power was furnished.

This Court has repeatedly held that the sovereign may, in the exercise of governmental powers, promulgate regulations and impose restrictions amounting in substance to a deprivation or even complete destruction of property rights. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Morris* v. *Duby*, 224 U. S. 135; *Tagg Bros.* v. *United States*, 280 U. S. 420.

If petitioner considered the President's requirement to be unjust or unreasonable, it should have refused to comply with it until assured of adequate protection. Then the President might have made affirmative provision for reimbursement by the Power Company; or he might have deemed it advisable to take steps toward the appropriation of petitioner's water rights and payment of compensation under the provisions of the National Defense Act, assuming he had authority to do so. As this Court said in the *Morrisdale Coal Company case*, 259 U. S. 188, *supra*, at p. 190:

> It now seeks to hold the Government answerable for making a rule that it saw

> fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker.

It may perhaps be said that the administrative officers had no authority to regulate the distribution of electric and hydraulic power. If it be true that the direction to the Power Company to take and use petitioner's water was unauthorized by law, the injury complained of was simply a tortious interference with petitioner's property, and the United States may not be sued for the torts of its officers or agents. *Schillinger* v. *United States*, 155 U. S. 163; *Bigby* v. *United States*, 188 U. S. 400; *Hijo* v. *United States*, 194 U. S. 315; cf. *Atwater & Co.* v. *United States*, *supra*.

If the interference was tortious, the Power Company was a joint tort-feasor. The Power Company performed the physical act of taking and was the sole recipient of pecuniary profit resulting therefrom. It was directly enabled to increase its production capacity, its sales, and therefore its profits. The record does not disclose any regulation by the Government of its scheduled rates, and it is to be

inferred that its receipts were augmented in proportion to the additional water power which it acquired. There is, therefore, no injustice in the Government's contention that petitioner should have recourse against the Power Company.

IV

IF THE PETITIONER IS ENTITLED TO RECOVER FOR THE TAKING, IT IS NOT ENTITLED TO INTEREST

Petitioner claims interest from the date of the alleged taking at the rate of 6% on the amount of its direct overhead expense as found by the Court of Claims. (R. 64.) It has been held that where an action is, in its essence, a part of condemnation proceedings instituted by the Government, the amount of compensation should include a sum sufficient to give the claimant "the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking," and that such sum may be measured by interest at the proper rate. *Phelps* v. *United States*, 274 U. S. 341; *Liggett & Myers* v. *United States*, 274 U. S. 215; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123. But in each of these cases the property was taken pursuant to express statutory authority, without the consent of its owner, and in each case recovery was had under a statute which expressly provided for the payment of "just compensation."

But if recovery be had in the instant case it can only be under Section 145 of the Judicial Code which gives

the Court of Claims jurisdiction of a suit against the United States to recover on a contract express or implied. When the claim is on contract, no interest can be recovered because of the provisions of Section 177 of the Judicial Code. This section provides that no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims unless upon a contract expressly stipulating for its payment. The Government does not become a debtor until damages have been awarded and no interest is allowable. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX

SUMMARY OF EMERGENCY LEGISLATION

National Defense Act (Act of June 3, 1916, c. 134, 39 Stat. 166, 213; U. S. C., Title 50, Sec. 80)

Section 120 authorized the President, in time of war—

> to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such *product or material* as may be required, and which is of the nature and kind usually *produced or capable of being produced* by such individual, firm, company, association, corporation, or organized manufacturing industry. (Italics ours.)

Compliance with such an order was made obligatory, and in the event of noncompliance the President might take over the plant and operate it through the Ordnance Department of the Army. This Act by its terms related solely to the *product* of a plant.

Section 124 authorized the President to make an investigation as to the best means for the production of nitrates and other useful products by water power and any other power, and to—

> designate for the exclusive use of the United States, * * * such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks,

> improvements to navigation, power houses, and other plants and equipment or other means than water power * * *.

The following paragraph of Section 124 authorized the President to purchase or condemn lands, materials, minerals and processes "as may be necessary for the construction and operation of such plants * * * and for the manufacture of such products." This paragraph might be construed as applicable to the instant case were it not for the concluding paragraph, which reads as follows:

> The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

Act of August 29, 1916, c. 418, 39, Stat. 619, 645.

This Act authorized the President through the Secretary of War, "to take possession and assume control of any system or systems of transportation, * * *.

Shipping Board Act (Act of September 7, 1916, c. 451, 39 Stat. 728, 731)

Section 10 of this Act authorized the President to—

> take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board: * * *.

Naval Emergency Fund Act (Act of March 4, 1917, c. 180, 39 Stat. 1168, 1192, 1193)

This Act authorized the President to requisition "ships or war material * * * of the nature, kind, and quantity usually produced or capable of being

produced" by the person with whom the order was placed. This provision appears to be directed solely to manufactured products required for naval purposes. The Act also authorized the President to "requisition and take over for use or operation by the Government any factory, or any part thereof * * *." The authority vested in the President was delegated by him to the Secretary of the Navy. Executive order 2687, dated August 21, 1917.

Emergency Shipping Fund Act (Act of June 15, 1917, c. 29, 40 Stat. 182)

This Act also relates to manufactured products required for naval purposes, and the authority vested in the President was delegated to the Secretary of the Navy under the Executive Order referred to in the preceding paragraph, and to the Emergency Fleet Corporation by Executive Order No. 2664, dated July 11, 1917.

Land Condemnation Act (Act of July 2, 1917, c. 35, 40 Stat. 241; U. S. C., Title 50, Sec. 171)

This Act authorized the Secretary of War to acquire by condemnation land required for—

> the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * *.

There was a proviso to the effect that in time of war possession might be acquired upon the filing of the petition of condemnation.

By an amendment (Act of April 11, 1918, c. 51, 40 Stat. 518; U. S. C., Title 50, Sec. 171), enacted after the issuance of the requisition order to the Niagara Falls Power Company, and the commencement of the diversion of water of the International Paper Company, the purposes for which land might be so condemned were added to as follows:

> and for the construction and operation of plants for the production of nitrates and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operation of such plants.

This amendment was not in effect in December, 1917, and does not purport to ratify acts done at the time of its passage. Nor is there anything to show that the requisition order to the Niagara Falls Power Company had any relation to the production of nitrates or similar products. Furthermore, the amendment is apparently *in pari materia* with Section 124 of the National Defense Act, *supra*, and must be construed as applying only to plants to be constructed and operated solely by the United States.

Food Control Act, known as the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276, 279)

Section 10 of this Act authorized the President—

> to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; * * *.

The context makes it appear doubtful whether the Act was applicable to water power. The authority

conferred upon the President was delegated by him to the Food Administrator, except as to supplies necessary for the support of the Army or the maintenance of the Navy. Executive Order 2736, dated October 23, 1917. It has been determined that actions to recover for property taken under Section 10 must be brought in the District Courts. *United States* v. *Pfitsch*, 256 U. S. 547.

Section 12 of this Act provided for the requisition "for use or operation by the Government," of any "factory, packing house, oil pipe line, mine, or other plant."

Act of October 6, 1917, c. 79, 40 Stat. 345, 352, 353

This Act authorized the President to take over the possession and title to land "including * * * riparian and other rights appurtenant thereto;" but this power was granted only as to land needed "for increasing facilities for the proof and test of ordnance material." Other provisions of this Act (p. 371) authorized the President to take over land and appurtenances necessary "for the construction of torpedo-boat destroyers, their hulls, machinery, and appurtenances."

Act of July 9, 1918, c. 143, 40 Stat. 845, 895

This Act provided that "any person, association, or corporation," for the purposes of furnishing electric power to the United States, or to others engaged in the manufacture of war supplies, might, with the approval of the Secretary of War, institute proceedings for the condemnation of land "required for the location or construction of any line or lines for the transmission of electric power." By Section 3 it

was provided that immediate possession could be secured by the "person, association, or corporation" upon filing a bond to secure payment of just compensation.

This Act was not approved until more than six months after the action taken by the Secretary of War in the instant case.

Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272)

This Act was intended to give a remedy upon contracts irregularly executed, not upon contracts made without authority. *Baltimore & Ohio Railroad* v. *United States*, 261 U. S. 592; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200; *Chesapeake & Potomac Telephone Co.* v. *United States*, 281 U. S. 385.

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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1930

INTERNATIONAL PAPER CO., PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

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ERRATUM

On page 18 of the brief for the United States heretofore filed, the word "petitioner" occurring on the sixth and seventh lines from the top should be amended to read "Power Company."

ADDITIONAL CITATIONS

As bearing upon the effect of the statutes upon which the petitioner relies in its reply brief, see the volume published by the Government Printing Office in 1918 entitled: "Emergency Legislation, Passed Prior to December, 1917, Dealing With the Control and Taking of Private Property

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for the Public Use, Benefit, or Welfare; Presidential Proclamations and Executive Orders Thereunder, To and Including January 31, 1918. Summary Memorandum. By J. Reuben Clark, Jr., Major, Judge Advocate General's Officer's Reserve Corps, Assigned to Special Duty with the Attorney General of the United States."

A copy of this volume is in the Library of the Department of Justice. We refer particularly to the following pages of that part of this publication called "Summary Memorandum:" 14–16. Also cf. Statutes analyzed on pp. 63–68.

An examination of the Executive Orders which appear on pages 169–200 of that part of the publication headed "Emergency Legislation" does not disclose any delegation by the President to the Secretary of War of authority conferred by the National Defense Act (Act of June 3, 1916, c. 139, 39 Stat. 166, 213; U. S. C., Title 50, Sec. 80). Executive Order No. 2687, of August 21, 1917 (pp. 176–177), delegates authority under the Naval Emergency Fund Act to the Secretary of the Navy.

We have also examined a pamphlet published by the Government Printing Office in 1921 bearing the following title: "The Power Situation During the War, By Col. Charles Keller, Corps of Engineers, with Appendixes Containing Reports on Conditions in the Several Power Districts. Published by Authority of the Secretary of War." On

pp. 46–47 of this pamphlet appears the following statement:

THE FINAL PLAN OF RELIEF

PROPOSED RELIEF

In order to definitely remedy the power shortage after consultation with the other departments of the Government and interests concerned, and after final approval by the President of the course proposed, the War Industries Board, in August, 1918, requested Congressman T. W. Sims, chairman of the House Committee on Interstate and Foreign Commerce, to introduce a bill the object of which was to allow the President to provide means for the better utilization of existing sources of power and the development of new sources. It provided $175,000,000 for the purchase and building of power plants. The bill was drawn on broad lines, authorizing the building of power plants, the increase in capacity of private plants or assistance in equipping or expanding such plants, the purchase of power plants, the leasing of plants or taking over of their product and its distribution, and the construction of pipe or transmission lines necessary for distribution or interconnection. Authority was further given to change, cancel, or suspend any existing and future contracts for power so that it might be distributed to the advantage of the production of war material. New corporations could be formed, private or public rights

acquired, mergers or consolidations of private plants could be made, and property acquired could be duly sold, if desirable, under certain reasonable restrictions. This bill, known as H. R. 12776, would have solved the problem of obtaining additional power and would ultimately have made available means for relieving many localities where power was short.

The bill was supported in person before Congress by the Secretary of War; Chairman Baruch, of the War Industries Board; and Director Garfield, of the Fuel Administration; also by the Shipping Board, the War Finance Corporation, and others. Its passage was urged by all familiar with the problem of sufficient power supply. It passed the House and in due course was submitted to a Senate committee for investigation, when the events leading up to the German defeat began and the consideration of the bill ceased with the signing of the armistice. It is proper to state here that the Senate committee had not approved the bill as presented to it and had one or two substitutes under consideration when the war ended. A copy of the bill is appended, marked "Exhibit C."

A copy of the bill, H. R. 12776, appears on pp. 126–130. It is entitled:

> A bill to provide further for the national security and defense and for the more effective prosecution of the war by furnishing means for the better utilization

of the existing sources of electrical and mechanical power and for the development of new sources of such power, and for other purposes.

The following extracts are pertinent, but do not give and are not intended to give any indication of the entire scope of the bill:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this act, unless the context shall require a different interpretation—

* * * * *

(g) The term "to acquire" means to purchase, requisition, condemn, or take over the title to, or to lease, requisition, condemn, or take over the right to use, occupy, or operate the whole or any part of; and, unless it shall be limited by the context, includes all such acts.

* * * * *

SEC. 2. That the President is hereby authorized and empowered, within the limits of the amounts herein authorized, or that may hereafter be authorized—

(1) To construct at any place or places within the boundaries of the United States such power plant or power plants as he may deem necessary; * * *

(2) For the purpose of increasing the capacity or productivity of any private power plant within the boundaries of the United States to install in any such plant any struc-

ture, machinery, or appliances that he may deem useful to that end, either through agents or contractors employed by him, or by providing the owner or operator of such plant with funds to be applied to that purpose: * * *

(3) To aid in equipping any private power plant or in expanding any such plant to such extent as he may direct by making advances, upon such terms and conditions as he may determine, to the person operating or authorized to operate it. * * *.

* * * * *

(10) In furtherance of any of the foregoing purposes, to acquire any property or property rights, including any public or private rights, or any interest in any such rights; or any material, machinery, appliances, or processes, patented or otherwise, which he may deem necessary or useful for the construction, development, expansion, or operation of any such plant or transmission lines.

* * * * *

SEC. 4. That whenever any act done pursuant to the provisions of this act shall constitute a taking of private property within the meaning of the Constitution, just compensation shall be made therefor in an amount to be determined by the President; and if the amount so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so

determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per cetnum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE 1931

SUPREME COURT OF THE UNITED STATES.

No. 37.—October Term, 1930.

International Paper Company, Petitioner, vs. The United States.	On Writ of Certiorari to the Court of Claims.

[January 19, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate.

On December 28, 1917, the Secretary of War wrote to the Power Company that "The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defence, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and for your plants and machinery connected therewith." Immediate and continuous delivery of such power was directed and it was added "You will be paid fair and just compensation for power delivered here-

under." At the same time an agreement was made by the Secretary of War and the Power Company, (reciting that the President has requisitioned the power as above,) to the effect that the Secretary of War "acting for and in behalf of the United States" until further notice waives delivery of the power to the United States on the express condition that the Power Company shall distribute such power as provided in a schedule naming companies and amounts but not naming the petitioner, and on the other side the Power Company waives all right of compensation by reason of said requisition if permitted to carry on its business and to sell consistently with the exigencies of the national security and defence. On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company "Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. . . . This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity." And on December 31 telegraphed to the counsel of the petitioner "Power Company has been directed to take water hitherto used by International Paper Co." The petitioner had been notified of what was to happen but was allowed time to run out its stock on hand. On February 7, 1918, its use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.

The Government has urged different defences with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.

We shall accept as sufficient answer the reference of the petitioner to the National Defence Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

Then it is said that there was no taking, but merely a making of arrangements by contract. But all the agreements were on the footing that the Government had made a requisition that the other party was bound to obey. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220. It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps* v. *United States*, 274 U. S. 341, 343. *Campbell* v. *United States*, 266 U. S. 368, 370, 371. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656. Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power.

We perceive no difficulty arising from the case of *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end: that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30.

Judgment reversed.

Mr. Justice McReynolds, Mr. Justice Stone and Mr. Justice Roberts are of opinion that the judgment of the Court of Claims should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.